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STATUTORY INTERPRETATION AND THE REST OF THE ICEBERG: DIVERGENCES BETWEEN THE LOWER FEDERAL COURTS AND THE SUPREME COURT

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ABSTRACT

This Article examines the methods of statutory interpretation used by the lower federal courts, especially the federal district courts, and compares those methods to the practices of the U.S. Supreme Court. This novel research reveals both similarities across courts and some striking differences. The research shows that some interpretive tools are highly overrepresented in the Supreme Court's decisions, while other tools are much more prevalent in the lower courts. Differences in prevalence persist even after accounting for the selection effect that stems from the Supreme Court's discretionary docket. Another finding—based on a study of 40 years of cases from all three levels of the federal judiciary—is that all federal courts have shifted toward more frequent use of textualist tools in recent decades. However, that shift has been less pronounced as one moves down the judicial hierarchy.

The divergence between the interpretive practices of different federal courts has implications for both descriptive and normative accounts of

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statutory interpretation. On the descriptive side, most beliefs about statutory interpretation are based on the narrow and unrepresentative slice of judicial business conducted in the Supreme Court, but some of those beliefs turn out to be incorrect or incomplete as descriptions of statutory interpretation more generally. This research therefore substantially improves our understanding of the complex reality of judicial statutory interpretation. On the normative side, the results of this research can advance scholarly and judicial debates over whether lower courts should conduct statutory interpretation differently than the Supreme Court and whether the Court's interpretive methodology should be binding on lower courts. This Article's findings also suggest that the teaching of statutory interpretation should take into account the distinctive practices of the lower courts, where the vast majority of legal work is done.

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INTRODUCTION

Scholarship on statutory interpretation has traditionally focused on the U.S. Supreme Court. This narrow view is unfortunate because the Court's docket is a tiny and unrepresentative slice of the business of the federal courts, not to mention the business of the broader dispute-resolution system that includes state courts, administrative agencies, prosecutors, and private actors. The Court's atypicality threatens the relevance of normative theory that takes the Court as its model or its intended target. Worse still is the risk that scholars and litigators will embrace a distorted view of how statutory interpretation is conducted. It is therefore a positive development that several scholars have in recent years turned their attention to the interpretive practices of other courts, in particular the federal courts of appeals and several state supreme courts.¹

Nonetheless, our nascent knowledge of the lower courts' practices remains dwarfed by our ignorance. The most important gap in our knowledge concerns the federal district courts. Their interpretive practices have not been studied in any systematic way, though there have been a few limited studies on topics such as district courts' interpretation of the tax code or other specific kinds of statutes.² This

1. On the federal courts of appeals, see generally FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 180–200 (2008); James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681 (2017) [hereinafter Brudney & Baum, *Protean Statutory Interpretation*]; Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481 (2015); and Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018). For an examination of several state supreme courts, see generally Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

2. See, e.g., James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 33–81 (1994) (consumer cases in state and lower federal courts); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory*

Article surveys the previously hidden bulk of the iceberg by studying the interpretive practices of the lower federal courts, with a particular emphasis on the district courts. This Article also compares those practices to the practices of the Supreme Court.

There is good reason to suspect that statutory interpretation in the lower courts would be different than interpretation in the Supreme Court. In the busy lower courts, especially in the district courts, one would expect terse applications of precedent and plain language to be the rule, rather than the lengthy explorations of competing canons and obscure sources that are the usual stuff of the Supreme Court's opinions. For a hint of the kind of divergences that systematic study might reveal, consider the paths of what are arguably the four most notable Supreme Court statutory-interpretation cases of the last five years: *King v. Burwell*,³ the Affordable Care Act subsidies case; *Yates v. United States*,⁴ the undersized-fish case; *Bond v. United States*,⁵ the case of adultery and a chemically burned thumb; and *Lockhart v. United States*,⁶ a sentencing case that was watched closely by interpretation mavens.⁷ In two of these four blockbusters-to-be, namely *Lockhart* and *Bond*, there was *no* written opinion in the district court, only an oral ruling from the bench. In the Supreme Court, *Lockhart* generated dueling opinions from Justices Sotomayor and Kagan, both of whom wielded grammar canons, statutory structure, legislative history, and the rule of lenity. The district judge, by contrast, had made short work of the issue that would vex the Justices, rejecting the defendant's argument about the statute's coverage by stating during a hearing, "I'm ruling that the plain reading of the statute

Interpretation in Federal Tax Cases, 31 N.M. L. REV. 325, 338–51 (2001) (federal tax cases in district courts).

3. *King v. Burwell*, 135 S. Ct. 2480 (2015).

4. *Yates v. United States*, 135 S. Ct. 1074 (2015).

5. *Bond v. United States*, 134 S. Ct. 2077 (2014).

6. *Lockhart v. United States*, 136 S. Ct. 958 (2016).

7. These are the four Supreme Court cases set out as principal cases in the statutory-interpretation chapters of the 2016 supplement to what is generally regarded as the leading book in the field, WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, 2016 SUPPLEMENT TO CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY vi (2016). All four of these cases have generated significant scholarly and blogospheric commentary. See, e.g., Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015) (discussing *King*, *Yates*, and *Bond*); Asher Steinberg, *Lockhart v. United States—Argument Recap, and Ruminations on Canon Entrepreneurship, Legal Indeterminacy, and Legislative History*, THE NARROWEST GROUNDS (Nov. 7, 2015, 1:16 PM), <http://narrowestgrounds.blogspot.com/2015/11/lockhart-v-united-states-argument-recap.html> [<https://perma.cc/TVC9-C63P>].

negates [the defendant's] position.”⁸ The district judge in *Bond*, who likewise ruled from the bench, did not even address the federalism-tinged version of the canon of constitutional avoidance that the Supreme Court would later use to justify its narrow construction of the federal chemical-weapons statute.⁹

Unlike those two cases, *Yates* did generate a written opinion in the district court, albeit a brief one. Mr. Yates, a fisherman charged with destruction of evidence by throwing fish overboard, moved for acquittal on the ground that the statute at issue reached only the destruction of things like documents, not the undersized fish he had caught.¹⁰ The district court disagreed in a single paragraph.¹¹ The opinion relied on circuit precedent showing that the statute swept more broadly than the document-shredding scenarios that Congress seemed to have had in mind.¹² On appeal, the Eleventh Circuit's analysis of the statute's application to fish was limited to one paragraph that relied on what it regarded as the unambiguous ordinary meaning of the statutory phrase “tangible object.”¹³ That paragraph cited a dictionary definition of “tangible” but did not discuss the various linguistic canons and legislative intent arguments that would so occupy the Supreme Court.¹⁴

The outlier of the four cases is *King*, as the interpretive work in that case looked roughly similar at every level of the system. It was clear from the start that the legality of the Affordable Care Act's subsidies would, through one case or another, soon reach the Supreme Court. Starting in the district court, the briefing in *King* was expert and extensive, with the challengers already being represented by the appellate specialist who would later represent them in the Supreme Court.¹⁵ Several amicus briefs were filed even in the district court.¹⁶ The district court issued an opinion headed for publication in the *Federal*

8. Transcript of Sentencing, *United States v. Lockhart*, No. 11-CR-231 (E.D.N.Y. Feb. 1, 2013), reprinted in Joint Appendix at 43–45, *Lockhart*, 136 S. Ct. 958 (No. 14-8358), 2015 WL 4550240.

9. Motions Hearing, *United States v. Bond*, No. 07-CR-528 (E.D. Pa. Nov. 19, 2007), reprinted in Petition for Writ of Certiorari at App-26, *Bond*, 564 U.S. 211 (No. 09-1227), 2010 WL 1506717.

10. *United States v. Yates*, No. 2:10-CR-66-FTM-29SPC, 2011 WL 3444093, at *1 (M.D. Fla. Aug. 8, 2011) (citing *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008)).

11. *Id.*

12. *Id.*

13. *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013).

14. *Id.*

15. *King v. Sebelius*, 997 F. Supp. 2d 415, 418 (E.D. Va. 2014).

16. Docket Sheet, *King*, 997 F. Supp. 2d 415 (No. 13-CV-006300-JRS).

Supplement 2d, itself a rare event, and upheld the subsidies in a thorough opinion that addressed the *Chevron*¹⁷ deference doctrine, “whole-act” arguments, the superfluity canon, a federalism clear-statement rule, legislative history, and Congressional Budget Office analyses.¹⁸ The court of appeals used most of the same tools and upheld the Government’s position under *Chevron*.¹⁹ The Supreme Court also ultimately upheld the Affordable Care Act subsidies.²⁰ Probably the most striking difference between the Supreme Court’s opinion and those that preceded it involved the role of *Chevron* deference, which the lower courts employed but the Supreme Court pointedly did not apply.²¹

Four cases amount to no more than anecdote, but the much larger study undertaken for this Article shows that divergence between the interpretive practices of the Supreme Court and the lower courts is real and systematic. I examined the use of over 20 interpretive tools at each level of the federal judiciary. For some particularly important tools, I examined a period of 40 years. The rest of the tools were studied across a decade. I also scrutinized in greater depth the last five years of Supreme Court decisions together with the opinions of the district courts and courts of appeals in those same cases. No remotely comparable study of the district courts’ interpretive practices has been undertaken before. This study also substantially extends the modest existing research on the courts of appeals and, to allow comparisons across tiers of the judiciary, conducts novel research on the Supreme Court as well.

To preview, one overarching finding of this Article is that courts at different levels of the system are both *doing different things* and *doing things differently*. That is, the lower courts spend only a small part of their time resolving the difficult interpretive questions that make up much of the Supreme Court’s docket. But even when the lower courts do confront those same questions, the lower courts’ practices meaningfully diverge from the Supreme Court’s practices. There are also several subsidiary findings that engage with important debates in the literature. These include the following results:

First, although the lower courts and the Supreme Court all shifted

17. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

18. *King*, 997 F. Supp. 2d at 426–32.

19. *King v. Burwell*, 759 F.3d 358, 376 (4th Cir. 2014).

20. *King v. Burwell*, 135 S. Ct. 2480 (2015).

21. *Id.* at 2489.

toward textualist tools starting in the late-1980s, the change was dampened and less transformative at each step further down the judicial hierarchy.

Second, there are significant differences across the judicial hierarchy in the frequency with which interpretive tools are used. Almost every interpretive canon or source, except for precedent, is used much less in lower courts, but that effect does not apply to all tools equally. For example, some canons are “top-heavy”—that is, highly overrepresented in the Supreme Court. Other tools are relatively more common further down the hierarchy, making those tools “bottom-heavy.” Legislative history is commonly used at all levels, but courts differ in which kinds of legislative history they use, with the lower courts heavily emphasizing the most accessible and authoritative kinds.

Third, the results reveal another form of unpredictability in statutory interpretation. Even within a single case, different interpretive canons are used as the case moves through the judicial system. There are many cases in which the Supreme Court’s analytical tools did not appear at all in the opinions of the court of appeals or the district court.

Fourth, some canons display lifecycles in which they are initially prominent in the Supreme Court and then gradually spread through the rest of the system. This pattern characterizes the federalism canons of the Rehnquist era, for example.

In light of the findings just summarized, one can fairly conclude that the tip of the iceberg is not representative of the whole. This divergence between the interpretive practices of different federal courts has implications for both the descriptive and the normative literatures on statutory interpretation. On the descriptive side, many beliefs and assumptions that correctly describe the Supreme Court’s practices are wrong or incomplete as a description of the rest of the system. On the normative side, there is a growing literature on whether lower federal courts and state courts *should* do statutory interpretation differently than the Supreme Court.²² Normative prescriptions should

22. See, e.g., Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (arguing that statutory interpretation should differ across courts according to each court’s particular institutional circumstances); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (proposing that statutory interpretation should differ depending on whether a judge is elected or appointed); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017) (arguing that only the Supreme Court should apply the “major questions exception” to the *Chevron* doctrine, see *supra* note 17 and accompanying text); Ethan

proceed from a robust account of actual practices, especially where those practices are driven by relatively fixed institutional constraints.²³ A better understanding of the lower courts' practices may alter normative prescriptions or at least allow for the gap between prescription and reality to be more accurately measured.

This Article's findings also have practical implications for the teaching of statutory interpretation in law schools. The Supreme Court will, and probably should, remain the focus of statutory-interpretation pedagogy. Its decisions offer the richest debates, and its work serves as a model and guide for other courts. Old favorites like *Holy Trinity*²⁴ and new classics like *King v. Burwell*²⁵ provide a vocabulary that lawyers should know. But teaching students that the lower courts are different is necessary to ensure that students are well prepared to practice in the courts in which virtually all students will spend much more time than they will spend litigating in the Supreme Court.

This Article is organized as follows. Part I uses existing understandings of judicial institutions and judicial behavior to explain why the interpretive practices of the lower courts, especially the district courts, can be expected to diverge from the practices of the Supreme Court. Setting out these expectations is important because it can direct the investigation of the lower courts' practices—a potentially massive topic—toward particular hypotheses and key questions.

Part II presents the findings and reaches generalizations about lower-court interpretation. There is no single right methodology for studying interpretive approaches, but a sound strategy is to use multiple techniques, acknowledge their strengths and weaknesses, and put the most confidence in results that persist across techniques. This Article uses several distinct techniques. One approach is to examine

Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 910–929 (2013) (arguing that local judges should have discretion in interpreting local laws and ambiguous state statutes); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (arguing that state courts with common-law powers should interpret statutes differently than federal courts).

23. See Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 96 (2017) (observing that “[r]ules of interpretation must reflect the resources available to the task”); see also KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 13–16 (2013) (emphasizing the importance of combining conceptual insights and institutional realities); *infra* Part I.B.1 (describing institutional factors like caseloads and resource disparities). See generally Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that an institution's interpretive approach should reflect its capacities and role).

24. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

25. 135 S. Ct. 2480.

the rates and ratios at which various tools are used in different courts. This comparison reveals which interpretive tools are the most overrepresented and underrepresented in the lower courts as compared to the Supreme Court. This Article also uses a “matched-corpus method” in which a smaller group of cases is closely examined at all three levels of the federal judicial system. This method shows that interpretive differences across courts persist even within a single case with a fixed set of facts and statutory provisions. Part II also tracks several especially important tools over several decades to see how their use has evolved at different levels of the judiciary. Finally, Part II explains how the findings require reassessment of some conventional truths found in the Supreme Court–oriented literature.

This Article concludes with recommendations for future lines of normative and descriptive scholarship, suggestions for courts and attorneys about how they might respond to interpretive divergence, and a call for instructors to reorient their pedagogical priorities.

I. WHAT LOWER-COURT INTERPRETATION SHOULD LOOK LIKE: TENTATIVE HYPOTHESES AND KEY UNANSWERED QUESTIONS

The goal of this research, stated in broad terms, is to determine whether and in what respects the interpretive practices of the lower courts, especially the federal district courts, differ from the practices of the U.S. Supreme Court.²⁶ This topic is broad, but the existing theoretical and empirical literature, together with knowledge of the institutional features of the courts, can identify subjects of particular importance and suggest tentative hypotheses to investigate. Accordingly, this Part generates some predictions and identifies some key questions about lower-court interpretation. The first step in that effort is to explain why a degree of interpretive divergence across

26. This Article does not explore methodological divergences between different courts at the same level of the system, such as different circuits or different federal districts. Different circuits and districts have somewhat different case mixes, which make different canons and tools more or less relevant to their work. Beyond that, the uneven timing of judicial retirements means that presidents will make their mark on some courts faster and more deeply than on others, leading to temporary ideologically generated differences. And purely by happenstance, an entrepreneurial judge or two can create a distinctive local interpretive culture. *Cf.* Brudney & Baum, *Protean Statutory Interpretation*, *supra* note 1, at 726–27 (conjecturing that the antipathy to dictionaries of Judges Easterbrook and Posner may explain the low rate of dictionary use on the Seventh Circuit). Nor does this study examine judge-level characteristics, such as age, party of appointing president, and pre-appointment career. Some of the variables discussed in this footnote could well be expected to influence interpretive methods, but the investigation here is limited to the differences across tiers of the judiciary.

courts is possible.

A. *The Opportunity for Divergence and Limits on It*

There are limits on the amount of divergence in interpretive practices that one could reasonably expect to see from courts within the same hierarchy. This is so for several reasons. To begin with, to the extent that methodological choices drive bottom-line results, a hierarchical judicial system could not tolerate interpretive differences so vast that they routinely led to reversals on appeal. That would be the equivalent of a factory in which the workers on the assembly line paint widgets red, only to have the quality-control inspectors at the end of the line repaint them all green. Further, at least some lower-court judges regard certain aspects of interpretive methodology as being subject to the Supreme Court's direction.²⁷ Perhaps more important than any formal supervisory control, however, is the fact that members of the federal judiciary are engaged in a shared enterprise, with the Supreme Court providing the leading example of their common craft.²⁸ Finally, judges and the attorneys who argue before them are all exposed to the broader legal culture's intellectual currents, such as the shift toward textualism and interpretive formalism that has occurred in recent decades.²⁹ All of those forces push courts toward conformity.

Nonetheless, several countervailing factors allow and even encourage interpretive divergence. First, although some fundamentals of interpretation are widely embraced—for example, that the text is ordinarily the most important consideration—there is no consensus on a single “right way” to do statutory interpretation.³⁰ No court, and not

27. See generally Gluck & Posner, *supra* note 1, at 1331–32, 1343–46 (reporting that most of the judges in their survey did not believe the Supreme Court's methods were binding, though the judges made exceptions for *Chevron* and some substantive canons); Aaron-Andrew P. Bruhl, What Would It Mean to Have Methodological *Stare Decisis* (and Do We Already Have It)? (unpublished manuscript) (on file with author) (showing that there is more evidence of methodological *stare decisis* than has generally been appreciated).

28. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 97–104, 112–14 (2006); see also THE SUPREME COURT'S STYLE GUIDE iii (Jack Metzler ed. 2016) (writing that the Court's opinions “are natural exemplars for judges of other courts and for lawyers who seek to improve by emulating the very best the legal profession has to offer”).

29. See Paul Clement, Editorial, *Arguing Before Justice Scalia*, N.Y. TIMES, Feb. 17, 2016 (describing Justice Scalia's influence on interpretive advocacy); Marty Lederman, *Textualism? Purposivism? The Chief Justice Comes Down on the Side of Interpretive Pragmatism*, SLATE (June 25, 2015, 4: 26 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_john_roberts_ruling_in_king_v_burwell.html [<https://perma.cc/SNJ9-Y2UT>] (similar).

30. GREENAWALT, *supra* note 23, at 43; Brudney & Baum, *Protean Statutory Interpretation*,

even any single judge, is completely consistent in interpretive approach from case to case. When appellate courts are themselves impure and inconsistent, it is hard for them to impose interpretive discipline on lower courts; it is likewise hard for those lower courts to know what rules they are supposed to follow, assuming obedience is even their goal.

Second, even where interpretive doctrines are widely embraced, the doctrines often take the form of fuzzy standards or factors of indeterminate weight. For example, many canons take the form of presumptions that are rebuttable by “enough” contrary evidence, and many doctrines apply only when the text is “ambiguous.”³¹ Such doctrines allow reasonably divergent applications, and noncompliance is hard to detect.³²

Third, the potential enforcers of uniformity in interpretation have relatively weak incentives to do so. Litigants—that is, potential appellants and petitioners—are understandably focused on who wins, not which interpretive tools were used to get to the bottom line. The Supreme Court’s concern is admittedly broader; the Court cares not so much about specific case outcomes as about whether lower courts are giving a statute a consistent meaning.³³ However, the link between interpretive methods and interpretive outputs is loose enough³⁴ that policing methodology per se is not an immediate imperative for the Court. Would the Court grant certiorari on a statutory question of no great policy significance that the lower courts had all decided the same way, just so that the Court could repudiate a lower court’s methodology while affirming the ultimate holding? Similarly, would the Court *fail* to grant certiorari on an otherwise cert-worthy circuit split, just because the lower courts had all used the same method, even the “correct” method? In both cases the answer is almost certainly *no*.

Fourth, interpretive methodology is not regarded as binding to the same extent that precedents normally bind.³⁵ Thus, even if reviewing

supra note 1, at 691.

31. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135–38 (2016) (book review).

32. See Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 14–18 (2012).

33. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1630–39 (2008).

34. See Brudney & Baum, *Protean Statutory Interpretation*, *supra* note 1, at 692; Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 882 (2006).

35. Gluck & Posner, *supra* note 1, at 1343–44; Bruhl, *supra* note 27.

courts themselves regularized their practices and purported to issue binding methodological edicts, it is not clear that lower courts would be legally required to obey them.

B. Causes of Divergence and Which Divergences They Encourage

For the reasons just set out, there is room for interpretive divergence across the tiers of the judiciary, albeit within limits. More than that, there are affirmative reasons to *expect* divergence and to expect it to take particular forms. We can divide the factors that encourage methodological divergence into a few categories: differences in institutional context, differences in judicial preferences, and time-lag effects. The following subsections elaborate on these drivers of divergence and explain how they might influence interpretive practices.

1. *Institutional Context and Capacity.* Courts are decision-making systems composed not just of judges, but also of court staff, attorneys, and others. These actors interact within structures and informational architectures that vary from court to court. We can expect divergences in interpretive methods to arise from the institutional differences between courts at different levels of the federal system. This is a large category of influences that naturally divides into a few subcategories.

a. Resources. The resources available for making legal decisions are abundant at the top of the judicial system and decrease as one moves down the pyramid. The Supreme Court's oral-argument docket has recently consisted of only around 70 cases per year.³⁶ Each of those cases receives the attention of nine experienced judges, each of whom is assisted by resourceful librarians and several highly capable clerks. The briefing and arguments before the Court are increasingly presented by Supreme Court experts.³⁷ Almost every case attracts amicus briefs that present additional arguments, information, and perspectives.³⁸ When the United States is not a party, the Solicitor

36. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS tbl.A-1 (2017) [hereinafter JUDICIAL BUSINESS], <http://www.uscourts.gov/statistics-reports/judicial-business-2017-tables> [https://perma.cc/DT8T-ARD9].

37. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1557 (2008).

38. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902–04 (2016); Anthony J. Franze & R. Reeves Anderson, *In Unusual Term, Big Year for Amicus*

General frequently files amicus briefs that are prized for their deliberation and evenhandedness.³⁹ This is a resource-rich environment, inside and out, and that richness shows itself in the Court's work product; the decisions are usually lengthy and full of interpretive thrusts and parries, and they often feature multiple opinions sparring over the key points.⁴⁰

The decision-making environment is less favorable in the courts of appeals. The caseload is much higher, so the amount of time available for each case is tightly constricted.⁴¹ Most cases do not get oral argument but are instead decided only on the briefs, often with minimal collegial deliberation.⁴² The quality of briefing is lower on average.⁴³ The parties often fail to make the right arguments and present the best information, but the cases must be decided anyway because jurisdiction is almost entirely mandatory.⁴⁴ Amicus briefs, which might fill the gaps in the parties' presentations, are uncommon.⁴⁵ Even a judge as able as Judge Easterbrook of the Seventh Circuit admits feeling pushed to the edge of his competence.⁴⁶

Curiae at the Supreme Court, NAT'L L.J. (Sept. 21, 2016).

39. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1353–60 (2010) (providing statistics on the Solicitor General's participation).

40. See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISION, AND DEVELOPMENTS* 252–57 tbl.3-2, 258–63 tbl.3-3, 264–65 tbl.3-4 (6th ed. 2015) (reporting data on the number and length of opinions).

41. See BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR, JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, *THE LAW OF JUDICIAL PRECEDENT* 257 (2016); Easterbrook, *supra* note 23, at 95–96.

42. See JUDICIAL BUSINESS, *supra* note 36, tbl.B-10 (showing that 80 percent of cases before the federal courts of appeals were decided without argument). To be sure, not every case requires much deliberation; some appeals are near frivolous. Still, capacity constraints are the reason that streamlined decision-making practices became so prevalent, so it is reasonable to suppose that in a richer environment some of the cases would receive better and more elaborated dispositions. See generally WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* 83–127 (2012) (describing various efficiency measures courts of appeals have adopted in response to docket pressures).

43. See, e.g., *Interview with Justice Stephen G. Breyer*, 13 SCRIBES J. LEGAL WRITING 145, 160 (2010) (assessing briefing in the Supreme Court as “pretty uniformly good” and stating that “[y]ou’ll get very good briefs in the circuits on a lesser number of occasions”).

44. See 28 U.S.C. § 1291 (2012) (assigning the courts of appeals mandatory jurisdiction over most final decisions of district courts).

45. See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686–87 (2008).

46. See Easterbrook, *supra* note 23, at 95–97 (describing the common assumption that judges have unlimited time to deliberate as “a bunch of baloney!”).

The environment for legal decision-making is least favorable of all in the busy and often understaffed district courts. A district judge's attention cannot focus primarily on legal questions but must also be devoted to other important duties like managing the case, overseeing discovery, and facilitating settlement.⁴⁷ District courts are not collegial courts, so legal rulings are made without the benefit of other judges who may have different perspectives, offer new arguments, or point out weaknesses in tentative positions.⁴⁸ District judges generally have fewer law clerks than appellate judges.⁴⁹ The Federal Rules of Civil Procedure, which govern practice in the district courts, do not even expressly provide for amicus briefs, though they are filed on rare occasions.⁵⁰ Most district judges are highly competent, but shortcuts and errors are to be expected. Consider the recent remarks of District Judge Jed Rakoff, who is nobody's idea of a slouch:

[A] district judge doesn't have the luxury to treat every case and every issue with the total attention it might theoretically deserve. District judges' busy dockets demand they get on with the job, and that often requires arriving at a tentative "common sense" solution to the underlying dispute presented by a case before they have had a chance to fully plumb every legal nicety.⁵¹

The statutory-interpretive consequences of the resource disparities just described will be fleshed out below, but the short of it is that constrained decision-making environments can be expected to lead to simpler and quicker interpretive approaches.

b. Differences in Docket Composition. Courts at different levels of the system confront different kinds of cases and issues.

Difficulty of cases. To start with, the legal questions addressed by the Supreme Court are typically harder than the legal questions

47. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991).

48. See *id.* at 232 (observing that courts of appeals, unlike district courts, “employ multijudge panels . . . that permit reflective dialogue and collective judgment”).

49. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 235 (2013); *REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 66 (Sept. 1991).

50. *E.g.*, *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136–37 (D.D.C. 2008).

51. Joel Cohen, Richard A. Posner & Jed S. Rakoff, *Should a Judge Rely on the Law or His Own Common Sense?*, SLATE (Sept. 18, 2017, 11:04 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/should_a_judge_rely_on_the_law_or_his_own_common_sense.html [https://perma.cc/P3LZ-TWTV].

answered by the lower courts.⁵² *Harder*, for these purposes, means that the most authoritative legal sources are underdeterminate. Cases generally do not reach the Court when they are obviously resolved by precedent or clear text.⁵³ That means that the Court routinely needs to bring to bear a variety of tools, or rely on debatable applications of tools, in order to discern or construct statutory meaning. Because the decisions are debatable, there are often separate opinions. A concurrence or dissent might introduce countervailing tools or canons—for example, a substantive canon or legislative history to rebut a whole-code linguistic inference. As a result, a Supreme Court opinion is often an elaborate confection featuring many tools intensively used.

District courts certainly do difficult work, and lots of it, but hard *legal questions* are unusual.⁵⁴ Most of the legal questions they encounter are settled by precedent or controlled by unambiguous text. Even in the courts of appeals, where the easiest cases will never make it, the vast majority of decisions are unpublished because the judges regard them as making no contribution to the law.⁵⁵ Most cases in the district courts also have little ideological significance, which means there is little reason to evade what appear to be straightforward answers.⁵⁶ The application of a state's comparative negligence statute to a car crash is less likely to stir up a judge's personal political leanings than a question about the intersection of antidiscrimination statutes and religious freedoms. For these reasons, even if the lower courts had time for exhaustive analysis and explanation in every case, which they do not, there would often be no need for it.

Different mix of cases and legal issues. Different federal courts encounter a different mix of topics and, within a given case, address different kinds of issues. The following are a few such differences that

52. See EPSTEIN ET AL., *supra* note 49, at 234–235.

53. Cf. Sup. Ct. R. 10 (listing conflict between lower courts as a reason for granting review).

54. See JON O. NEWMAN, *BENCHED: ABORTION, TERRORISTS, DRONES, CROOKS, SUPREME COURT, KENNEDY, NIXON, DEMI MOORE, AND OTHER TALES FROM THE LIFE OF A FEDERAL JUDGE* 251 (2017).

55. See JUDICIAL BUSINESS, *supra* note 42, tbl.B-12 (providing statistics on publication rates).

56. See Herbert M. Kritzer, Robert A. Carp & Kenneth L. Manning, *Polarization in American Politics: Does it Extend to the Federal District Court?* 23 (July 21, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3007983> [<https://perma.cc/9K4S-6DSG>] (“It is on the trial bench where we might expect that the legal model of judicial behavior—that is, the understanding that judges’ decision-making is primarily driven by law, facts, and precedent rather than their own personal policy preferences—would be most often manifested.”).

are likely to generate some divergences in interpretive practices. Unlike the differences above, which mostly affect the amount of canon use, this category of differences affects which canons are needed most.

The modern U.S. Supreme Court almost never decides issues of state law, but the lower federal courts routinely do so.⁵⁷ On the civil side of the docket, almost 30 percent of the district courts' caseload is made up of diversity cases.⁵⁸ As a matter of interpretive theory, it is an interesting question whether a federal court's *Erie*-based duty to apply state law entails a duty to use state interpretive tools and approaches.⁵⁹ As a practical matter, however, the lower federal courts often apply state "code construction acts," state versions of familiar canons, and even canons that do not have any direct federal analogue.⁶⁰ The lower courts' diversity docket therefore provides a reason to suspect that some tools will appear relatively more often in the lower courts, though it is hard to predict which ones.

Some methodological divergence can be expected to arise from the specialized or limited jurisdictions of certain lower courts. For example, the Federal Circuit, which hears all veterans' benefits appeals, has a disproportionate opportunity to use the substantive canon of construing statutes in favor of the veteran.⁶¹ District courts as a class have less opportunity to apply agency-deference doctrines because many cases reviewing agency action begin directly in the courts of appeals, skipping the district courts entirely.⁶²

Even within the same case, different courts tend to direct their interpretive efforts toward different issues. District courts spend a greater proportion of their time on jurisdiction, discovery, and other

57. The Supreme Court does hear cases that were originally filed in the district court under diversity jurisdiction, but the modern Court hears those cases only in order to resolve matters of *federal* law that arise along the way, e.g., *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198–99 (1988), not to decide state-law issues.

58. JUDICIAL BUSINESS, *supra* note 42, tbl.C-4.

59. See generally Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 758, 782–84 (2013) (discussing this question).

60. E.g., *Antonio v. SSA Sec., Inc.*, 749 F.3d 227, 237 (4th Cir. 2014) (applying Maryland's presumption against the implied repeal of common law); *Gold v. N.Y. Life Ins. Co.*, 730 F.3d 137, 143–44 (2d Cir. 2013) (applying New York's presumption against legislative retroactivity); *Miller v. LaSalle Bank Nat'l Ass'n*, 595 F.3d 782, 786–87 (7th Cir. 2010) (citing various Indiana canons of construction); *Tex. Pharmacy Ass'n v. Prudential Ins. Co. of Am.*, 105 F.3d 1035, 1039 (5th Cir. 1997) (applying the Texas Code Construction Act's rule on severability of invalid statutory provisions).

61. E.g., *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001).

62. E.g., 28 U.S.C. § 2342 (2012) (certain orders of the FCC and several other agencies).

procedural matters than the Supreme Court does.⁶³ This is not to say that the Supreme Court is uninterested in civil procedure or jurisdiction—on the contrary, the Roberts Court has recently shown a substantial interest⁶⁴—but almost *every* case in the lower courts that requires judicial action involves decisions on procedural, jurisdictional, or evidentiary matters. The Supreme Court generally hears only one question in a case, usually a question of substantive law, and the Court is almost always free to disregard the procedural or evidentiary matters that may have constituted much of the judicial activity below.

Limitations on federal appellate jurisdiction also cause systematic differences in the issues that occupy different courts. For example, there is little opportunity for appellate opinions on discovery because discovery rulings are usually not immediately appealable, and, if and when the time for appeal does come, those rulings often have become moot or practically unimportant.⁶⁵ Similarly, appellate courts have less opportunity to address some categories of jurisdictional disputes because decisions remanding removed cases to state court for lack of federal jurisdiction are generally not appealable.⁶⁶ This has an important impact on the prevalence of interpretive canons across courts because there is a substantive canon calling for the strict construction of jurisdictional statutes, a canon invoked most often in the context of the removal statute.⁶⁷ District courts have far more opportunities to apply this canon than appellate courts.

c. Role of Precedent. Precedent plays a different role in different courts. Although the Supreme Court frequently cites various sorts of precedents in its statutory-interpretive decisions,⁶⁸ the Court is bound only by its own decisions, and it is rare for the Court to exercise its

63. As compared to courts of appeals cases, the Supreme Court's opinions are underpopulated with words involving procedure and evidence. See Michael A. Livermore, Allen B. Riddell & Daniel N. Rockmore, *The Supreme Court and the Judicial Genre*, 59 ARIZ. L. REV. 837, 872 (2017). One would expect the effect to be even stronger in the district courts. See generally Elizabeth Y. McCuskey, *Horizontal Procedure* (unpublished manuscript) (on file with author) (describing the preeminence of district courts in generating caselaw on matters of procedure, especially on matters of discovery and case management).

64. See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 313–14 (2012).

65. THOMAS A. MAUET & DAVID MARCUS, PRETRIAL § 6.1 at 195 (9th ed. 2015).

66. 28 U.S.C. § 1447(d). *But see* 28 U.S.C. § 1453(c)(1) (making an exception for certain large class actions).

67. See Bruhl, *supra* note 1, at 506–08.

68. See Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093 (1992).

discretionary jurisdiction to hear a case that is squarely resolved by its prior holdings.⁶⁹ Precedent is much thicker and more constraining in the lower courts, as not just Supreme Court precedents but also circuit precedents are binding on the issuing circuit and its district courts. Therefore, one often sees lower courts decide cases through the routine application of local precedent even when the issue is so unsettled at the national level that it later results in a Supreme Court decision. For example, in *McNeill v. United States*,⁷⁰ the Supreme Court resolved a circuit split over the Armed Career Criminal Act by using plain meaning, the whole-act rule, and the absurd-results doctrine.⁷¹ The district court in the same case had written an unpublished opinion that relied, for the relevant point, on an unpublished (and therefore nonbinding) circuit decision.⁷² Similarly, the question that divided the Supreme Court 5 to 4 in *Dorsey v. United States*,⁷³ was considered so settled that the district judge stated from the bench, “I have ruled on this many times before so I won’t be spending a lot of time nor asking [the prosecutor or defense attorney] to respond [to the ruling].”⁷⁴ The overwhelming importance of precedent in the lower courts today, combined with the rarity of cases of first impression, has left all *other* interpretive tools—for example, textual and substantive canons, dictionaries, and legislative debates—with less of a role to play.

The nature of the hierarchical system also makes it more important for the Supreme Court to get its few but highly consequential decisions right. There is no further reviewing court to correct the Court’s errors, and congressional overrides of Supreme Court decisions are difficult and increasingly rare.⁷⁵ The legal interpretations of the district courts, by contrast, are highly provisional

69. The Court can of course overrule its precedents, but *stare decisis* has particular force in statutory cases. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015).

70. *McNeill v. United States*, 563 U.S. 816 (2011).

71. *Id.* at 821–22.

72. *United States v. McNeill*, No. 5:08-CR-2-D-1 (E.D.N.C. Jan. 26, 2009), 2009 U.S. Dist. LEXIS 131062 at *13.

73. *Dorsey v. United States*, 567 U.S. 260 (2012).

74. Transcript of Sentencing Hearing, *United States v. Dorsey*, No. 09-20003 (C.D. Ill. Sept. 10, 2010), reprinted in Joint Appendix at *69, *Dorsey v. United States*, No. 11-5683 (Jan. 25, 2012), 2012 WL 608393.

75. There is disagreement over how to define overrides and when the decline started, but there is agreement that overrides have sharply declined. See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209, 218 (2013); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1332–33 (2014).

and so, even if there were enough time to do so, it might not make sense for the district courts to turn over every stone to find what looks like the *best* decision in a close case. Still, it is bracing to see, in an official publication of the Federal Judicial Center, newly appointed district judges being given the following advice about how to approach cases in which the law is unsettled or nonexistent:

Do not worry about whether you may be reversed. No judge has been impeached for having been reversed. Get on with the opinion and do the best you can. The court of appeals or the Supreme Court is going to have the last word anyhow.⁷⁶

The courts of appeals are indeed often the last word, but even there one sometimes observes judges stating that they need not do their all to get a case right. In particular, judges sometimes argue against rehearing a case *en banc*, which would allow them to reexamine questionable circuit precedent, because the issue is one that the Supreme Court could be reasonably expected to resolve in the near future anyway.⁷⁷

d. Executive Advice. Another potentially relevant difference across judicial tiers is that the Supreme Court gets more input from the executive branch on how to decide cases. When the United States is not a party to a Supreme Court case, the government often submits an amicus brief, especially when the interpretation of a federal statute is at issue.⁷⁸ At a minimum, these briefs provide helpful information to the Court. More than that, the briefs can present an administrative agency's official interpretation, not previously announced, that can then warrant deference from the Court under the *Skidmore*⁷⁹ and *Auer/Seminole Rock*⁸⁰ doctrines.⁸¹ Agency amicus briefs are rare in the lower courts, especially in the district courts.⁸² The lower courts

76. FEDERAL JUDICIAL CENTER, BENCHBOOK FOR UNITED STATES DISTRICT COURT JUDGES 209 (6th ed. 2013).

77. *E.g.*, NEWMAN, *supra* note 54, at 165.

78. *See* Cordray & Cordray, *supra* note 39, at 1353–60 (describing the Solicitor General's amicus activity).

79. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

80. *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

81. *E.g.*, *Auer*, 519 U.S. at 461–62 (deferring to the interpretation of a regulation advanced in the government's amicus brief).

82. *See, e.g.*, *Dekeyser v. Thyssenkrupp Waupaca Inc.*, No. 08-C-488, 2009 WL 5214418, at *1 (E.D. Wis. Dec. 28, 2009) (denying a party's motion to invite an agency to submit a brief);

therefore have fewer occasions to use the doctrines, so prevalent in the Supreme Court, that govern deference to agency interpretations presented in briefs.⁸³

2. *Ideological Differences.* Judges have policy preferences, and these preferences express themselves in statutory cases as in other domains.⁸⁴ The effects of judicial ideologies can be expected to play out somewhat differently at different levels of the judicial system.

To begin with, Supreme Court cases are generally high stakes and difficult—that is, least constrained by authoritative legal materials⁸⁵—so there is more motive and opportunity for ideology to operate at the Supreme Court level. What this means for interpretive methods is not entirely clear. It probably means that canons and other tools play less of a role in determining outcomes than they do in lower courts, even if the Court’s opinions make fulsome use of them. At the same time, it could be that the public scrutiny trained on the Court makes the Justices sensitive to charges of activism and could encourage them to adopt at least a pose of restraint. The desire to avoid charges of activism has been put forward as a potential explanation for the Court’s unusually firm embrace of the purportedly neutral guidance offered by dictionaries.⁸⁶

In terms of the *content* of judicial preferences, it is possible for different courts to fall at different places on the ideological spectrum. This can have methodological consequences because some aspects of the familiar left–right divide have predictable associations with views about particular interpretive canons, such as conservatism being associated with canons protecting sovereign immunity and disfavoring extraterritorial application of federal law.⁸⁷ We might, therefore,

Burgess v. Garvin, No. 01 CIV. 10994 (GEL), 2004 WL 527053, at *4 n.2 (S.D.N.Y. Mar. 16, 2004) (noting that the government declined the court’s invitation to file an amicus brief).

83. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–99, 1111–15 (2008) (documenting the role of government amicus briefs as sources of interpretations in the Supreme Court).

84. See, e.g., CASS R. SUNSTEIN, DAVID SCHKADE, LISA ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 24–40 (2006) (showing the effect of ideology in several statutory fields).

85. See *supra* Part I.B.1.b (describing differences in case difficulty across tiers of the judiciary).

86. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 499–500 (2013).

87. For example, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), Justice Marshall’s dissent for the three most liberal Justices criticized the majority for strengthening the

expect conservative-leaning courts to favor different canons than liberal-leaning courts. To be sure, the ideological differences across tiers could not be too large without leading to unsustainable conflict, and a president generally appoints like-minded judges to all levels of the judiciary. But there is some slack in the system due to factors like home-state senators' influence and lumpiness in the timing of retirements and replacements across different courts.⁸⁸

There are other preferences—not ideological in the familiar left–right sense—that can be expected to vary systematically across courts. These preferences include, notably, institutionally oriented preferences about how the judicial system operates. For example, busy lower-court judges might favor canons that restrict their jurisdiction.⁸⁹

3. *Lag Effects.* The Supreme Court sometimes changes the rules of statutory interpretation.⁹⁰ Unless a change is instantly transmitted through the rest of the system, there will be a lag that creates at least a temporary divergence between different courts.

Consider the situation in which the Supreme Court stops using a canon. If the Court expressly repudiates the canon, one would expect the lower courts to catch on soon enough. If instead the Court simply stops using a canon even when the canon seems applicable, a faithful lower court might be unsure how to respond. Given uncertainty over the Court's reasons, and habit being a powerful force, the lower courts might be expected to continue using canons that have largely disappeared from the *U.S. Reports*. In prior work, I identified several canons that appear to be in this state of limbo, abandoned by the

presumption against extraterritoriality. *Id.* at 261–62 (Marshall, J., dissenting).

88. See generally Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (comparing ideology scores of the Supreme Court and each federal court of appeals); *Federal District Court Judge Ideology Data*, CHRISTINA L. BOYD (2015) <http://clboyd.net/ideology.html> [<https://perma.cc/CRY4-Z5VK>] (providing similar data for district judges).

89. See Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 553–55 (2017).

90. See, e.g., Bruhl, *supra* note 1, at 494–546 (discussing how lower courts respond when the Supreme Court changes the interpretive regime); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–29 (1992) (discussing the development of new canons in the Rehnquist Court); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. at *36 (forthcoming 2018) (on file with the *Duke Law Journal*); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001) (stating that “the Court has changed its practice, and sometimes the formally stated rules, with remarkable frequency”).

Supreme Court but soldiering on in the lower courts.⁹¹

In addition, it also turns out that certain canons have a natural lifecycle. That is, canons become prominent at different levels of the judicial system at different times. Think of a snake that swallows a mouse. One can see the bulge start at the snake's head and move slowly tailward as the mouse is digested. One might observe something similar when the Supreme Court creates a new interpretive canon. The canon is first prominent in the Supreme Court itself. The Court's use of the canon then declines as the activity slides to the courts of appeals and district courts, which digest the new development by working out its details and applying it to various cases. Eventually, the canon ends up, now fully absorbed into the system, in the lower courts' routine unpublished decisions.⁹²

For the sake of clarity, the changes in the interpretive regime under discussion here should be distinguished from the phenomenon of individual statutes having their own interpretive lifecycles. A new statute initially presents numerous questions of first impression. Gradually, as the important questions are answered, precedent becomes the dominant interpretive tool and many disputes merely require application of settled law to particular facts.⁹³ These statute-level changes ordinarily would not cause regime-level shifts, though such an effect is possible if, for instance, Congress stops passing a type of legislation associated with a subject-specific substantive canon.⁹⁴

C. *Summary of Predictions and Key Questions*

The foregoing pages discussed several potential drivers of interpretive divergence. Admittedly, it is not always clear how a particular feature of the lower courts should cash out in terms of interpretive methodology. But we do know enough to form some tentative predictions about what statutory interpretation in lower

91. Bruhl, *supra* note 1, at 521 (discussing canons involving civil rights, jurisdiction, and Indian law).

92. See *infra* Part II.F (describing such a pattern in connection with federalism canons).

93. See James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 224–26 (2006) (presenting evidence of a link between statutory age and declining use of legislative history for several statutes governing the workplace); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1722–25 (2010) (showing that the Supreme Court's use of legislative history generally declined with statutory age, though usage increased again once a statute became very old).

94. See Bruhl, *supra* note 1 at 524–26 (tentatively proposing that the decline of the civil-rights canon is partly explained by the aging of the leading civil-rights statutes).

courts should look like and to identify key questions to investigate.

One overarching expectation is that hierarchical divergence must stay within certain bounds. All federal courts are part of the same appellate system. Whether or not the Supreme Court's methodology is binding as a formal matter, the Supreme Court's pronouncements and patterns of conduct are highly salient and likely to be practically influential.⁹⁵ Professional norms of craft and the natural desire to advance one's reputation mean that lower-court judges want to do (and be seen as doing) good work.⁹⁶ The Supreme Court's style provides the natural benchmark for such evaluation.⁹⁷ So too, if the Supreme Court or particularly vocal members of it announce that the interpretive ground rules have changed and that textualism is the new philosophy, then the lower courts can be expected to take notice and adjust their own practices.

A key question, though, is how closely and quickly the lower courts follow the Supreme Court's lead. The analysis below will provide several opportunities to test how much slack exists in the system. Most notably, it will examine, in a study that spans several decades and all three tiers of the federal judiciary, whether the textualist renaissance of the 1980s and 1990s manifested itself in all courts or only in the Supreme Court.⁹⁸ And, zooming in on one specific topic, it studies the spread of the Rehnquist Court's "new federalism" canons.⁹⁹

One strong prediction—which is derived from the overlapping influence of caseload pressures, lower average difficulty of cases, lower average quality of briefing, and other factors—is that the lower courts' interpretive practices should be simpler than the Supreme Court's practices. The district courts' practices should be least complex of all. *Simplicity*, in this context, is operating as a term of art that means a couple of specific things. First, it means that *fewer interpretive tools* will be used in a decision. More specifically, all tools for resolving cases of first impression—such as textual analysis, legislative history, and substantive canons—should be less prevalent as one moves down the judicial hierarchy. Correspondingly, precedent should loom larger, the

95. See *supra* Part I.A.

96. See BAUM, *supra* note 28, at 53–54, 97–104 (noting judges' concern about their standing among legal audiences).

97. See *supra* note 28 and accompanying text.

98. *Infra* Part II.E.

99. *Infra* Part II.F.

lower the court. When precedent resolves a case, other sources need not be discussed as a doctrinal matter, and unnecessary discussion of them is a luxury that a busy court can little afford. Second, the lower courts' use of tools other than precedent should be skewed toward *simpler tools* and away from more complicated tools. Tools are more complex, for these purposes, to the extent that they require consideration of more numerous, more voluminous, and more ambiguous materials. People could reasonably debate whether a certain tool is simple or complicated, but most would agree that whole-act interpretations—and even more so, whole-code strategies—are more complicated than narrower word- or clause-bound strategies such as those relying on dictionaries and syntax. It is unclear where legislative history falls on the simplicity scale, but what is clear is that *within* the category of legislative history there are variations in complexity. Committee reports are generally more accessible and understandable than floor debates that might be scattered throughout hundreds of pages of the *Congressional Record*.

In addition to the general prediction of simplicity, one can expect some substantive canons to be concentrated at either the top or the bottom of the judiciary. For example, we should expect the lower courts, especially the district courts, to deal more often with canons regarding jurisdiction and procedure due to docket composition and limited opportunity to appeal such issues.

For some interpretive tools, different factors push in different directions, rendering the total predicted effect on prevalence indeterminate. Such is the case, notably, with deference doctrines like *Chevron*. On the one hand, the district courts could be eager to defer to agencies because of their caseload-driven demand for decision-making shortcuts and the general lack of political salience in their cases. On the other hand, opportunities to use some deference regimes are limited in the lower courts: many suits challenging agency action skip over the district courts altogether, and government amicus briefs offering new authoritative interpretations are rare outside of the Supreme Court.¹⁰⁰ In any event, it is valuable to investigate differences in the use of important interpretive tools like these even without clear hypotheses in mind.

Another prediction is that the differences between Supreme Court opinions and lower-court opinions should be starkest in the lower

100. *Supra* text accompanying notes 50 and 82.

courts' unpublished opinions. In the courts of appeals, only about 15 percent of opinions are designated for publication. Judges designate opinions as unpublished when they believe that they break no new ground and would not usefully contribute to the body of precedent.¹⁰¹ Published and unpublished opinions look very different. Unpublished decisions mostly apply settled precedent, often in a cursory way. They tend not to include much original interpretative work at all. Often, the two kinds of opinions are generated through different decisional pathways. Unpublished opinions usually result from cases that did not get oral argument, and they are sometimes drafted by central staff attorneys.¹⁰² Unless the courts' publication standards are meaningless or routinely ignored, one should expect systematic divergences between the interpretation-related features of published and unpublished decisions. In particular, it is reasonable to expect that *all* interpretive tools, apart from precedent, are particularly sparse in unpublished decisions. A likely exception to this generalization is the rule of lenity, which applies to the construction of criminal statutes. There are many very weak appeals by criminal defendants, including appeals in which the defendant acknowledges that the arguments are foreclosed by precedent.¹⁰³ Given the abundance of hopeless criminal appeals, it would not be surprising to see lenity appear often in unpublished appellate decisions, if only to reject the defendants' lenity-based pleas.

In the district courts, too, most opinions are not published in West's official reporters.¹⁰⁴ Those few district-court opinions that are published are selected because, in the estimation of the judge or West's attorneys, the decision is important or novel enough to be of general interest to the profession.¹⁰⁵ So here too there should be systematic

101. See, e.g., *In re Viola*, 583 F. App'x 669, 669 n.1 (9th Cir. 2014); 5TH CIR. R. 47.5.1. Publication rates are available in the Administrative Office's annual *Judicial Business* reports at tables B-12 or S-3, depending on the year. See JUDICIAL BUSINESS, *supra* note 42. The publication rates vary over time, but 15 percent is a rough average for the last decade. Reports going back two decades are available at <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> [<http://perma.cc/X6P9-AE7W>]. The traditional label of "published" is a bit misleading today, as even unpublished decisions are widely available. The real difference is that only published appellate opinions are binding precedent. E.g., 7TH CIR. R. 32.1(b); see GARNER ET AL., *supra* note 41, at 142.

102. See *supra* note 42.

103. E.g., *United States v. Presas*, 45 F. App'x 321, 321 (5th Cir. 2002).

104. See *infra* note 166 (describing the publication process in district courts).

105. See Ellen Platt, *Unpublished vs. Unreported: What's the Difference?*, 5 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 26, 27 (1996); *Submission Guidelines for Court Opinions*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/practice/>

variations, with the rather rare published opinions being more likely to feature extensive statutory-interpretive analysis than the more numerous and routine unpublished ones.

II. RESEARCH METHODS AND FINDINGS

With some key questions and predictions now in hand, this Part of the Article examines the interpretive practices of lower courts, especially the federal district courts, and compares them to the practices of the Supreme Court. There is no established protocol or single right approach to studying interpretive methodology. The best way to derive robust conclusions is to use multiple methods, search strategies, and comparisons. If different approaches yield similar results, that corroboration justifies greater confidence in the findings. It is also important to be transparent about one's methods and, where possible, to externally validate one's measures.

In an effort to achieve the desired robustness, this Article uses several distinct methods. One method studies a period of 40 years to track the changing use of several interpretive tools that figure prominently in the battle between textualism and opposing philosophies: legislative history, linguistic canons, dictionaries, and holistic-textual canons. Another portion of the analysis considers more than 20 canons over the period of a decade and identifies the interpretive tools that are most overrepresented and underrepresented in the lower courts as compared to the Supreme Court. Another approach is the matched-corpus method, in which the same cases are examined at all three levels of the federal judicial system. This method shows whether interpretive differences persist once one controls for the biasing effect of the Supreme Court's case-selection process. That is, the matched-corpus method reveals whether the lower courts and the Supreme Court are *doing the same things differently* as well as *doing different things*. Finally, there is a case study showing how one of the Rehnquist Court's state-sovereignty canons moved through different levels of the judicial system and different kinds of opinions.

To preview briefly, the findings from the different methods are consistent where they overlap and mostly support the hypotheses developed in Part I. The lower courts use fewer interpretive tools overall, and they especially avoid the most complex tools. This is true even in cases that eventually reach the Supreme Court. In addition, the

lower courts' interpretive practices tend to reflect, though in a rather loose way, the shifting trends in the Supreme Court's methods. In particular, the lower courts engaged in a textualist shift similar to the Supreme Court's, but it was lesser in magnitude.

Before presenting the different analyses and results, it is appropriate to provide some details regarding this study's methodology. Readers who are eager to see the results are welcome to skip ahead to Part II.C.

A. *Ways in Which Interpretation Can Differ Across Courts*

There are several ways that interpretive methods could vary across different courts. These include differences in doctrinal formulations of the governing rules and differences in case outcomes. Most of the analyses in this Article focus instead on variations in the *frequency* with which various canons and tools are used in different courts. It is therefore important to briefly describe the ways that interpretive methods could vary across courts and to explain why measuring canon frequency, rather than other forms of interpretive divergence, is an especially attractive strategy for studying cross-court differences.

One kind of cross-court divergence in interpretive approaches is *doctrinal* divergence. For example, courts might disagree over whether legislative history is ever a permissible input or over whether a statute is governed by a substantive canon. When the Supreme Court has been clear and consistent, such disputes should be rare even in a world of only semiprecedential methodology. The rarity of sharp doctrinal conflicts limits their usefulness as a tool for studying cross-court differences. A more mundane form of doctrinal divergence is disagreement over how exactly to formulate an acknowledged interpretive canon or how much force to give it—for example, whether to describe a rule disfavoring extraterritorial application of U.S. law as a mere presumption or as a clear-statement rule.¹⁰⁶ The difficulty in studying these sorts of divergences is that courts may not always be fully aware of such nuances and therefore might slip back and forth between different formulations.

A second way to understand interpretive divergence across the hierarchy of courts is to measure whether different courts tend to reach different interpretive *outcomes*. That is, if one court regularly

106. Cf. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 263 (1991) (Marshall, J., dissenting) (criticizing the majority for changing a mere presumption against extraterritorial application into a clear-statement rule).

interprets criminal statutes to reach more conduct than another court, other explanations having been ruled out, then that court shows less “lenity in fact,” even if both courts say the same thing, or nothing at all, about the rule of lenity. Similarly, one could study whether different courts are more or less likely to defer to agency interpretations.¹⁰⁷ A difficulty in studying statutory interpretation through case outcomes lies in controlling for other variables that influence outcomes at the case level or court level. Docket composition and ideological factors would need to be considered, for example. Likewise relevant, but much harder to measure and quantify, are many other outcome-relevant features of a given case.

Interpretive tools are especially difficult targets for outcome-oriented study. For one thing, the invocation of a particular tool may appear to cause a particular outcome, but the causal relationship might actually run in the opposite direction. That is, it could be that judges are choosing outcomes and then selecting (or instructing the clerks to select) the tools that explain or justify them. Even setting that risk aside, the nature of the canons is that they merely *contribute* to the determination of legal meaning. They are not rigid, case-determinative rules. As Judge Easterbrook put it, writing in a particularly canon-skeptical tone, “every canon implicitly begins or ends with the statement ‘unless the context indicates otherwise,’ which potentially leaves so much room for maneuver that the canon isn’t doing much work.”¹⁰⁸ As even the canons’ staunchest advocates concede, different canons need to be synthesized and reconciled through the use of sound professional judgment.¹⁰⁹ Further, the triggering conditions for many canons and tools are vague, such as a requirement that the text be “ambiguous.”¹¹⁰ Ambiguity is a troublesome trigger because there is no agreement on how clear a text must be in order to count as unambiguous. And even if different judges agreed that the threshold clarity should be, say, 65 percent clear, they might still disagree over

107. E.g., Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 28–32, 43 (2017); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1238, 1271, 1280 (2007); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519 (2011).

108. Easterbrook, *supra* note 23, at 83.

109. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51, 59–62 (2012).

110. See Kavanaugh, *supra* note 31, at 2135–36 (listing legislative history, the avoidance canon, and *Chevron* as examples of tools only triggered by a finding of ambiguity).

whether a particular text reaches that mark.¹¹¹ Even in the formalist's heaven, then, there would be only slight associations between the use of a particular interpretive tool and case outcomes.

Rather than studying interpretive divergence through doctrinal differences or case outcomes, this Article largely focuses on a third way that courts might diverge, one that considers doctrine but studies it in a quantitative way. In particular, this Article focuses on the *frequency* with which different courts use various interpretive canons and sources.¹¹² This measure is important and tractable. To a significant degree, the observable difference between competing interpretive approaches lies in which tools they prioritize and emphasize.¹¹³ A judge that uses linguistic canons and dictionaries extensively but uses legislative history sparingly is more textualist than a judge who displays the opposite tendencies. The choice of tools gives concrete expression to differences in interpretive philosophy. Happily, the invocation of interpretive tools in an opinion is easier to measure than the underlying philosophies in the abstract.

Further, although one cannot draw a straight line from particular canons to case outcomes, that does not mean that canons have no effect on outcomes. They narrow the possibilities. They make certain decisional pathways easier to follow and explain.¹¹⁴ Especially in the lower courts—and in the district courts most of all—where caseloads are high and ideological stakes are usually low, canons and other legalistic tools probably exert significant influence on decisions.¹¹⁵

Finally, even if canons have nothing to do with generating outcomes, the invocation of certain canons over others is still

111. *Id.* at 2135–38.

112. *Cf.* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. (forthcoming 2019) (manuscript at 19) (citing frequency of use as one factor that determines whether an interpretive practice is a valid canon of interpretation), <http://ssrn.com/abstract=3141356> [<https://perma.cc/U4AU-XXVF>].

113. *See* Czarnecki & Ford, *supra* note 34, at 860–61 (identifying interpretive philosophies based on which tools a judge uses).

114. *Cf.* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305–06, 308–10 (2002) (describing “jurisprudential regimes”—the frameworks that structure and influence judicial decision-making by mediating between case facts and outcomes).

115. *See* EPSTEIN ET AL., *supra* note 49, at 9–11 (explaining that ideology matters more and legal considerations matter less as one moves up the judiciary); *see also* Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931, 980 (2012) (providing experimental evidence that reducing the time available for decision-making increases the likelihood that decisionmakers will obey legal constraints).

meaningful because it reveals the court's interpretive language—the way the court explains its decisions and seeks to persuade judges and attorneys of their correctness.¹¹⁶ If courts speak different languages, then the attorneys arguing before them need to speak the right language to the right court.

B. Overview of Research Methods

Several methodological matters about how to study canon frequency require brief comment.

1. *Identifying Cases that Use Canons.* As explained above, this Article studies interpretive approaches by examining how often courts use canons. This is done differently in different parts of the Article, depending on the goal at issue and the number of cases involved. For the matched-corpus analysis in Section II.D, which involves only a couple of hundred cases at each level of the judiciary, I used intentionally overinclusive search terms to identify potential hits and then read the material around the terms to decide whether a particular canon or source was being used to interpret a statute. For example, a search might use the word “hearing,” and then the search results would be reviewed to identify the cases that actually involve the use of a legislative hearing in connection with statutory interpretation.

The analysis in other parts of this Article covers one or more decades and many thousands of cases, making human reading impractical. To get a sense of scale, consider that the search strategy described in the next section identified over 100,000 unpublished district-court decisions over the last decade that involved statutory interpretation. Reading even a meaningful sample of those decisions would be impractical. Therefore, apart from the manageably sized matched-corpus study in Section II.D, the analyses in this Article rely on electronic searches, primarily in Westlaw, to identify and count cases. This means that search terms had to be carefully selected to reduce the incidence of false positives and false negatives. Here are two examples of search strings used in this study:

For linguistic canons:

adv: OP(((expressio or expresio or inclusio or “last antecedent” or

116. See Bruhl, *supra* note 1, at 505; Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 13 (1998).

“noscitur a sociis” or “ejusdem generis”) /50 (statut! or act or legislat!
or congress! or U.S.C.) or ((expressio or expresio or inclusio or “last
antecedent” or “noscitur a sociis” or “ejusdem generis”) /p (statut! or
act or legislat! or congress! or U.S.C.))) and DA([year])

For *Congressional Record*:

adv: OP(“Cong.Rec.” or “Cong. Rec.” or “Congressional Record”)
and OP((statut! or legislat! or congress! or U.S.C.) /s (interpret! or
constru! or meaning or reading)) and DA([year])¹¹⁷

Each of these search strings begins with the tool or tools at issue, including variant spellings and citation forms. The search string then adds a qualification meant to restrict the results to cases involving the interpretation of statutes rather than other texts, though admittedly with the result of excluding some statutory cases too. This restriction was important because linguistic canons and some other tools are used in contracts and insurance cases to interpret nonstatutory texts, and these cases arise frequently in the lower courts due to diversity jurisdiction. Some trial-and-error pilot testing helped to identify good search strings, that is, those that neither err too far toward false positives nor toward false negatives.¹¹⁸ Other search strings would generate somewhat different results, but that is acceptable for at least two reasons. First, the goal is to make cross-court comparisons in the use of canons, not to determine the precise levels of canon use in an absolute sense. Second, using different strategies in combination—such as these large-*n* electronic searches plus the individualized manual scrutiny applied in the matched-corpus analysis—justifies confidence in the robustness of repeated similar results.

Using electronic search strings in a large-*n* study restricts the range of interpretive tools that can be reliably studied. Fortunately, many interpretive tools are closely associated with particular names, phrases, or standard citation forms that make them easy to identify (for example, *ejusdem generis* and S. Rep./S. Rpt. or the words “Senate,” “committee,” and “report” in close proximity). Other tools cannot be identified so reliably and thus require human intervention. The use of the common law as an interpretive tool is an example of the latter,

117. The “adv” prefix instructs Westlaw to conduct a “terms and connectors” search rather than use the fuzzier search algorithms employed by default in the new WestlawNext system. The “OP” field limits the search to the opinions, excluding the West-created material in synopses, Key Numbers, and headnotes, all of which could introduce artificial cross-court and cross-period variation.

118. The search terms used for each tool are on file with the *Duke Law Journal*.

because there are many other reasons for “common law” to appear near references to statutes. As a result, some tools are included in the matched-corpus analysis but not elsewhere.

The methodology used in this Article does not involve any judgment about whether a canon was the primary determinant of the court’s decision or how much reliance the court placed on the source. Such judgments produce useful information, but they also introduce more subjectivity and make it difficult to analyze large numbers of cases. Further, “negative” uses of a canon—such as statements that a particular canon is unpersuasive or inapplicable to a case—are included in the results. That choice is sensible as a matter of interpretive theory because even those kinds of uses of a canon or source show that the tool is a recognized part of the court’s interpretive vocabulary. If a particular canon were not cited by attorneys and at least conceivably usable as judicial authority, there would be no need for the court to justify not applying it in a given case.¹¹⁹ Including negative citations is also a practical necessity for the large-*n* portions of the analysis. Finally, for purposes of this study, canons count if they appear in any opinion in a case, not just majority opinions.

2. *Selecting a Denominator.* Some parts of this analysis calculate citation rates and compare them across courts. Calculating a rate requires a denominator by which to divide the raw numbers of citations. Deriving an appropriate denominator takes some thought. Using the number of cases filed each year is too crude, as many district-court cases are resolved through early settlements or guilty pleas without any judicial opinions. At the other extreme, a few district-court cases generate multiple published opinions at various stages of the litigation. The number of written decisions would therefore be a better denominator, but that denominator would also be inadequate because many written decisions in the lower courts do not address statutory interpretation but instead concern factual issues, discretionary case-management matters, state common law, and so on.

I used a denominator that is meant to capture cases that meaningfully engage with statutory interpretation, as determinable through a Westlaw search string.¹²⁰ Different search terms would

119. See Mendelson, *supra* note 90, at *24–25 (arguing that “questions of a canon’s applicability are often difficult ones,” so when a court discusses but does not apply a canon, that discussion still clarifies the function of the canon in general).

120. The Westlaw search string I used to generate the denominator is adv: OP((statut! or legislat! or congress! or U.S.C.)/s (interpret! or constru! or meaning or reading)) and DA([year]).

generate different denominators and thus different rates, of course, so it would be a mistake to make precise claims about what percentage of cases use various tools. The aim is instead to provide a measure that facilitates comparisons across the judicial hierarchy by roughly adjusting for varying caseloads across courts and over time. The denominator used in this study meets those aims.

To provide an external check on the validity of this denominator, I compared my denominator to the number of cases in the Spaeth Supreme Court Database in which the primary or secondary legal authorities were coded as statutory.¹²¹ The two figures are not measuring exactly the same concept, but the two data series showed the same rising, falling, and leveling-off patterns over the period from 1975 to 2014, and they yielded a reassuringly high correlation coefficient of 0.86 ($p < 0.001$). That provides confidence that the denominator used here is a good measure for the Supreme Court and, by extension, for other courts as well.¹²²

I should note that some parts of this analysis do not rely on citation rates and therefore do not require a denominator. Again, the goal is to use multiple methods and to repose the most confidence in mutually reinforcing results.

3. *Sources and Databases.* Different data sources were used to collect cases for different parts of this Article. For the matched-corpus study in Section II.D, it was important to attempt to locate a district-court opinion for every Supreme Court case in the corpus. To secure these opinions, it was necessary to search Westlaw, Lexis, docket

121. To be precise, these are the Spaeth Supreme Court Database cases in which the variables *authorityDecision1* or *authorityDecision2* were coded as 4. For another source that uses the Database to calculate a denominator in this way, see Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 366 n.346 (2013). The figure derived from the Database is not measuring exactly the same thing as my denominator, because the former includes cases interpreting federal treaties and court rules, and because it is oriented toward the nature of the source at issue rather than the activity undertaken. See HAROLD SPAETH, LEE EPSTEIN, TED RUGER, SARAH C. BENESH, JEFFREY SEGAL & ANDREW D. MARTIN, SUPREME COURT DATABASE CODE BOOK 55 (2017), <http://scdb.wustl.edu/documentation.php?s=2> [<https://perma.cc/N3MC-XJZG>].

122. If there were a generally accepted measure for how many lower-court cases engage in statutory interpretation, I would use that, but no such measure has been widely agreed upon. There are government statistics that track filings and appeals by subject—for example, diversity cases, employment discrimination, and criminal sentencing—but the fact that a case is based on a statutory claim does not mean that the case involves the work of statutory interpretation. The resolution of a statutory claim could, for example, instead involve the assessment of the sufficiency of the evidence or the exercise of sentencing discretion.

sheets, and other sources.¹²³ For the time trends and other portions of the analysis, which involved searches over one or more decades and tens of thousands of cases, Westlaw was the main source. For purposes of this research, Westlaw appears to be more accurate than its competitor Lexis.¹²⁴

4. *Published vs. Unpublished Opinions.* As noted above, the large majority of decisions of the courts of appeals and district courts are not formally published.¹²⁵ The opinions that are published are not remotely a random sample of all opinions.¹²⁶ On the contrary, they are specifically selected for publication because they are significant. Therefore, to achieve an understanding of how the judicial system actually works, and how judges actually engage in statutory interpretation, one needs to consider the large body of unpublished opinions as well as the smaller group of published opinions.

Fortunately, even many unpublished decisions are now accessible through one source or another. Although some unpublished district-court opinions still linger in relative obscurity on docket sheets,¹²⁷ the

123. See *infra* text accompanying notes 159–63 (describing the sources employed in the matched-corpus study).

124. The two services' databases are not coextensive, and their search algorithms operate a bit differently, so using Lexis would yield very similar but not identical results. One reason that Westlaw is better for this study is that searching the "opinion" segment in Lexis excludes the opinion's footnotes, so the Lexis searches fail to find cases in which the search terms occur only in the footnotes. For other studies of district courts that have favored Westlaw, see Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 424 (2012); and David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 & n.138 (2007). One quirk of Westlaw's district-court database is that it includes decisions from the Judicial Panel on Multidistrict Litigation and from the Customs Court. Those decisions were removed from the results.

125. See *supra* text accompanying notes 101–05.

126. See Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 96–98 (2009) ("[A]uthoring judges decide whether to designate a particular opinion for publication, and their decision to do so may depend upon formal rules, court culture, personal predilections, or strategic considerations."); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 988–89 (2008) ("[T]he published opinions are considered to be the 'interesting' and 'important' opinions, in the words of West's publication guide . . ."). It is also true that written opinions, whether published or unpublished, do not represent all district-court action, much of which happens in oral rulings or one-line orders. See Kim et al., *supra*, at 98–101. However, in order to study judicial methods of statutory interpretation, one needs reasoned opinions of some sort, whether published, unpublished, or in the form of a reasoned ruling from the bench.

127. See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEVADA L.J. 515, 517 (2016) (identifying a set of precedent even more submerged than unpublished decisions: the "mass of reasoned *opinions*—putative precedent and not mere evidence of decision-making—that exist

Westlaw and Lexis databases are dramatically more comprehensive today than they used to be. For example, the number of unpublished district-court opinions on Westlaw that meet my denominator filter has increased more than tenfold from 1990 to the present, growing from about 1100 per year to about 12,000. For a point of comparison, the denominator for *published* district-court opinions has remained relatively stable at 1800 to 2400 per year. Most of this jump in unpublished opinions is attributable to broader availability on Westlaw and Lexis, not to busier courts.¹²⁸

Most of the analyses in this Article considered all published opinions as well as those unpublished opinions that are available through Westlaw. The matched-corpus analysis goes further; in an effort to gather lower-court opinions that correspond to every included Supreme Court case, it was sometimes necessary to search docket sheets and other sources. Nevertheless, the results reported here do not always display all categories of opinions. The unpublished opinions of the courts of appeals almost never include significant interpretive content.¹²⁹ That fact is important in its own right, but most of the analysis below omits detailed reporting of unpublished appellate opinions because there is little to report.

C. *Top-Heavy and Bottom-Heavy Canons*

A good place to begin the comparison of interpretive methods is to examine whether different courts tend to use different interpretive tools. This first inquiry is important because it may reveal that the Supreme Court's interpretive practices are quite different from those of the lower courts, which decide most of the cases and in which most litigators practice. Recall that two of the hypotheses developed above were that lower courts would both use fewer tools and emphasize less complicated tools. Are those suppositions correct?

only on dockets.”); Peter W. Martin, *District Court Opinions that Remain Hidden Despite a Longstanding Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference*, at *3 (Jan. 12, 2018), <https://ssrn.com/abstract=3034399> [https://perma.cc/N2WM-W6F8] (“Large numbers [of district-court decisions] remain hidden from lawyers, academics, and the general public.”).

128. The number of unpublished district-court cases in the denominator exploded around 2005, which likely reflects either a change in the companies' collection processes or the impact of the E-Government Act of 2002, which mandates that courts make more decisions publicly available. Pub. L. No. 107-347, § 205, 116 Stat. 2899 (2002).

129. *See infra* Part II.D.

This Section approaches those hypotheses by providing data on cross-tier differences in the use of around 20 tools of interpretation. This analysis uses both citation rates and ratios. Citation rates reflect the number of times a tool is cited, divided by the denominator of cases that meaningfully engage with statutory interpretation.¹³⁰ Citation ratios require a bit more explanation. If a canon appeared in 5000 district-court decisions and 50 Supreme Court decisions, the canon would have a 100:1 ratio. Suppose a different canon had a 10:1 ratio; that is, it appeared only 10 times in the district courts for every 1 appearance in the Supreme Court. The canon with the 10:1 ratio would be top-heavy in the sense that its use is skewed toward the Supreme Court relative to the 100:1 canon, which, in turn, is bottom-heavy. Notably, conclusions about relative top- and bottom-heaviness do not require an agreed-upon denominator; nor do these conclusions require the calculation of a neutral ratio that would reflect that all courts had acted the same.

The analysis in this section covers the decade spanning from 2005 to 2014, which roughly corresponds to the first decade of the Roberts Court.¹³¹ The analysis relies on Westlaw searches to identify cases from each of the three levels of the federal judiciary that used various interpretive canons or sources.¹³² Most of the tools in the figures below should be familiar,¹³³ but a few notes are in order: The entry for “whole act” encompasses searches for the presumption of consistent usage, the presumption of meaningful variation, and the *in pari materia* canon. For legislative history, the searches covered three important sources—committee reports (including conference committee reports), material from the *Congressional Record*, and committee hearings—along with a combined category for all three. “Defer to brief” refers to cases in which the court defers to an agency interpretation provided in the government’s brief.¹³⁴ In addition, and as explained in greater detail below, the searches included multiple formulations of the rule of

130. See *supra* Parts II.B.1–2 (describing how these measures are derived).

131. Chief Justice Roberts began his service on the Supreme Court in September 2005.

132. These Westlaw search strings are on file with the author and are available upon request.

133. For the benefit of readers who may not recognize some of the canons or sources listed in the figures, good reference works providing definitions and examples are WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. B (5th ed. 2014); and WILLIAM D. POPKIN, *A DICTIONARY OF STATUTORY INTERPRETATION* (2007).

134. See *supra* text accompanying note 83.

lenity.¹³⁵

Figure 1 presents the citation rates. The interpretive tools are arranged left to right from lowest to highest citation rate in unpublished district-court opinions. The results in Figure 1 should not be used to draw precise conclusions about the prevalence of various canons, as the reported citation rates are sensitive to the phrasing of the search terms and how one chooses to group canons together.¹³⁶ Rather, the point is to make cross-court comparisons *within each canon*. In that regard, one immediately sees that almost all the tools appear most often in Supreme Court opinions. Indeed, most tools display a stair-step pattern with usage rates lowest in unpublished district-court opinions and then increasing from there. That pattern is consistent with the hypothesis of hierarchically increasing interpretive complexity.

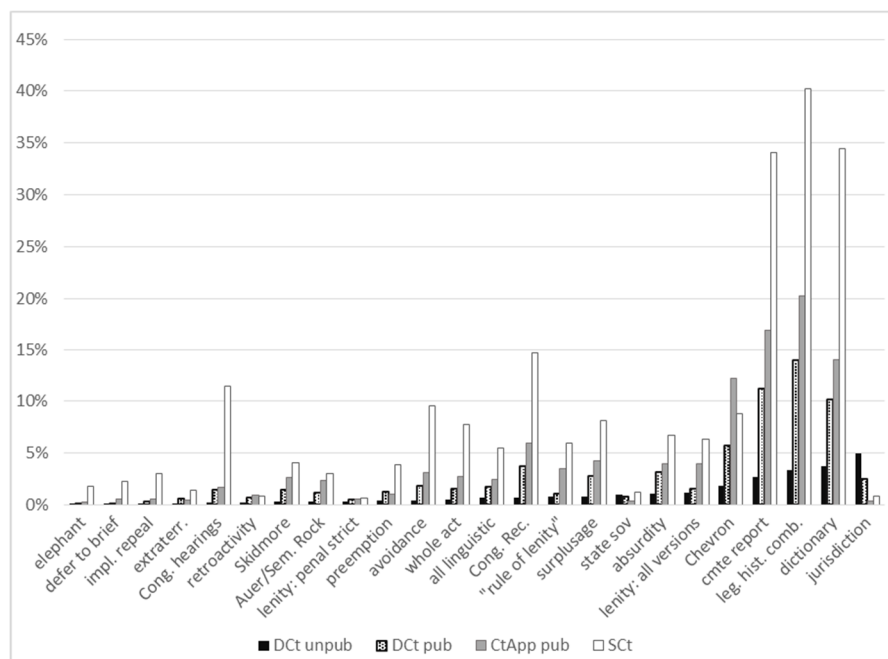
There are some interesting exceptions to the pattern of stair-step increases in citation rates within each source. One notable exception is *Chevron*, for which the courts of appeals, rather than the Supreme Court, are the leading users. Another is the canon of narrowly construing statutes conferring federal jurisdiction,¹³⁷ at the far right of the figure, which displays an inverted pattern in which it appears most often in unpublished district-court decisions and least often in appellate courts.

135. *Infra* Part II.C.1.

136. Mendelson's study of the Roberts-era Supreme Court uses roughly similar methods over a similar time period but covers different canons and defines and groups the canons differently. As a result, our citation rates for the Supreme Court are not directly comparable. Nonetheless, for most of the canons that are covered in both studies and defined similarly, the results are similar. *See* Mendelson, *supra* note 90, at *63 app. The biggest difference concerns *expressio unius*, which Mendelson finds at a high rate of about 18 percent. *Id.* In my study, it appears in only a few percent of the cases, and it is grouped with several other linguistic canons. The explanation is that my search for this canon includes only the named canon itself, which is typically used in conjunction with the core, list-focused form of the canon. Mendelson's *expressio unius* canon includes broader uses of the same idea, such as those involving contrasts between different sections of a law or between different laws. *Id.* at *42. As the purpose of my study is to make reliable cross-court comparisons, the precise percentage differences between canons are of secondary importance.

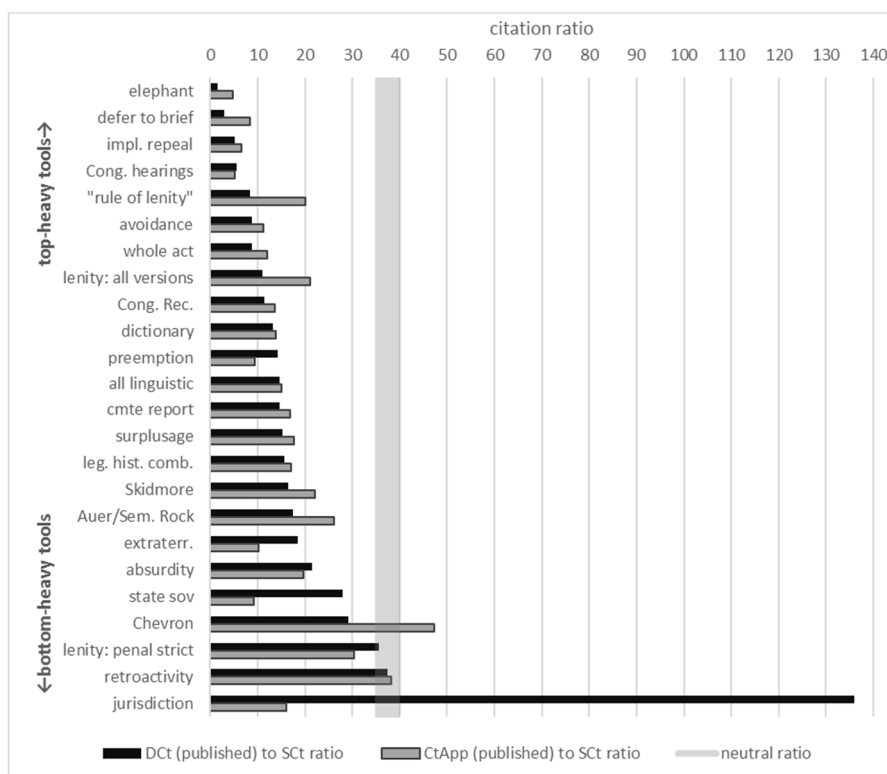
137. *E.g.*, *Surface Am., Inc. v. United Sur. & Indem. Co.*, 867 F. Supp. 2d 282, 286 (D.P.R. 2012) ("As courts of limited jurisdiction, federal courts are bound to construe jurisdictional grants narrowly."). This canon is also described as a presumption against jurisdiction, especially removal jurisdiction. *See generally* Bruhl, *supra* note 1, at 506–49 (describing this canon's meaning, origins, and justifications).

Figure 1: Citation Rates for Selected Interpretive Tools, 2005–2014



Because the tools depicted above vary substantially in prevalence, and because cross-canon differences are sensitive to differences in search strategies, the ratio method is particularly well suited for our task of studying *cross-court differences* in the relative importance of different tools. Figure 2 below shows the citation ratios for various canons in published opinions of the lower courts compared to the Supreme Court. The canons are arranged according to the district court-to-Supreme Court ratio, with relatively top-heavy, Supreme Court-focused canons at the top of the chart and bottom-heavy canons at the bottom. The presumption against preemption, which falls in the middle of the pack, can be used to explain how to read the figure. For every 1 Supreme Court case citing the presumption against preemption, there are about 15 published district-court opinions citing it and about 10 published court of appeals opinions citing it. For the most part, the citation ratio for each canon is similar for the district courts and courts of appeals, though several canons are significantly more prominent at one level than the other. *Chevron*, for example, is skewed toward the courts of appeals, and the jurisdiction canon is heavily skewed toward the district courts.

Figure 2: Citation Ratios for Selected Interpretive Tools, 2005–2014
(published opinions)



As noted, one can appreciate the relative top- and bottom-heaviness of the listed canons without knowing the baseline neutral ratio—that is, the ratio that would result if courts at each level had the same propensities in their statutory-interpretation cases. To provide some context, however, it might be useful to know that a rough estimate of the neutral ratio for published opinions of the courts of appeals and district courts is in the range of 35:1 or 40:1. That is because there are approximately 35 or 40 times more published statutory-interpretation cases both in the courts of appeals and in the district courts over the last decade (about 16,500 cases and 22,000 cases respectively) than there have been statutory-interpretation cases in the Supreme Court (about 500).¹³⁸ This ratio is represented by the vertical gray bar across the figure. Judged by the neutral ratio, almost all canons are overrepresented, on an absolute basis, at the Supreme

138. These figures represent the results of the denominator searches described in Part II.B.2.

Court level.

The results in Figure 2 would differ somewhat if different search strategies were used, so one should not place too much weight on fine distinctions in ratios. Instead one should focus on the canons that show particularly extreme results, especially where those results align with other findings elsewhere in this Article. Easily the most bottom-heavy canon in the district courts is the jurisdiction canon, the rule that federal jurisdictional statutes are to be narrowly construed. Less extreme, but also relatively overrepresented in the lower courts, are *Chevron*, which is especially heavy in the courts of appeals;¹³⁹ the old-fashioned formulation of the rule of lenity that calls for “strict construction” of penal statutes;¹⁴⁰ and a few traditional substantive presumptions, particularly the canon disfavoring legislative retroactivity. At the other extreme, the most top-heavy canon is the “no elephants in mouseholes” rule, followed by deference to government amicus briefs, the presumption against implied repeal, congressional hearings and debates, constitutional avoidance, and the whole-act presumptions.

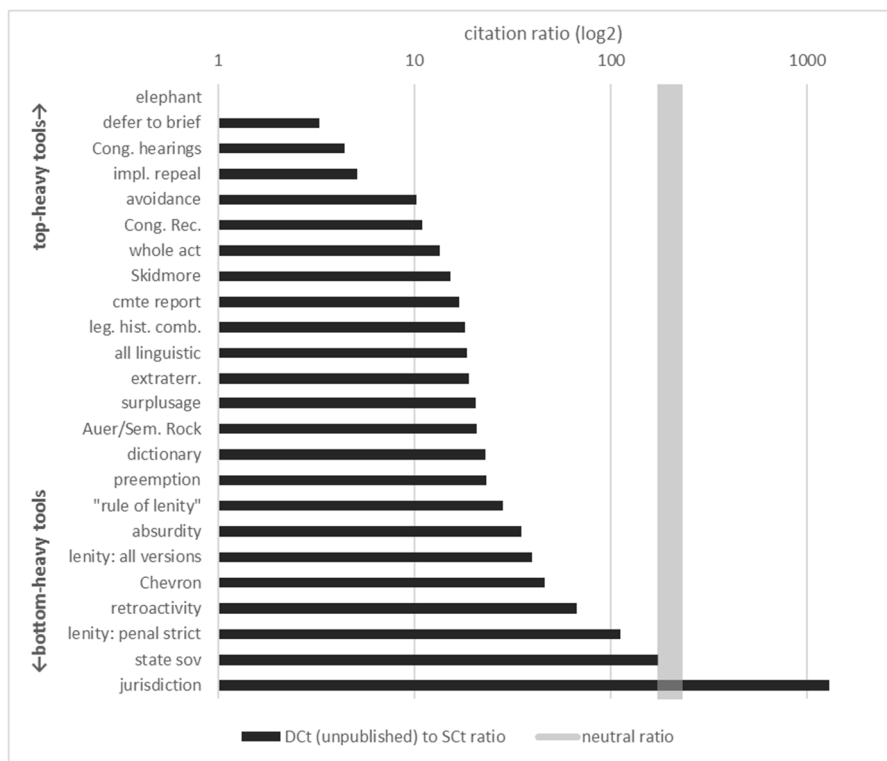
The figure above reflects published decisions, but it is also worthwhile to consider unpublished district-court decisions. (Unpublished decisions from the courts of appeals almost never use interpretive tools or canons,¹⁴¹ so they are not shown here.) As Figure 3 shows, the general patterns of relative top- and bottom-heaviness are similar to those on display in the previous figure. For unpublished district-court opinions, a reasonable neutral ratio is about 200:1, because there are about 200 times more unpublished district-court statutory-interpretation decisions from the last decade than there are Supreme Court statutory-interpretation decisions. Every canon falls short of the neutral ratio except for the jurisdiction canon, which appears so often that it was necessary to use a logarithmic scale. The relative prominence of the state-sovereignty canon in unpublished opinions has an interesting story that is discussed further in Section II.F; 25 years ago this canon behaved quite differently.

139. I conducted a circuit-by-circuit analysis for *Chevron*, and it showed, as one would expect, that the D.C. Circuit is a particularly heavy user of the doctrine.

140. See *infra* Part II.C.1 (discussing different formulations of the rule of lenity).

141. See *infra* Part II.D.

Figure 3: Citation Ratios for Selected Interpretive Tools, 2005–2014
(unpublished district-court opinions)



Several of the interpretive tools in Figures 1–3 merit additional comment.

1. *Rule of Lenity*. The figures above present three entries for different versions of the rule of lenity. For lenity and a few other canons, multiple searches were conducted using language aimed at capturing alternative formulations of the canon. Often the searches included a narrower formulation to minimize false positives and a broader formulation to minimize false negatives. For the rule of lenity, one search simply looked for the phrase “rule of lenity.” Another formulation, which reflects a traditional way of phrasing the canon, provides that penal laws are to be strictly, or narrowly, construed.¹⁴²

142. *E.g.*, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”); *see also*

The third search, “lenity: all versions,” included both of the previous forms.

The different search terms yielded interestingly different results across courts. The traditional strict-construction phrasing suggests a fairly robust rule that colors the court’s analysis from the start of every case that involves the meaning of a criminal statute. The rule reminds the court to be on the lookout for any lack of clarity in the criminal prohibition. Some Supreme Court opinions arguably reject that traditional strict-construction phrasing in favor of a weaker, last-resort, tiebreaking canon.¹⁴³ Perhaps as a result, the traditional strict-construction formulation is less common today than other formulations of the rule of lenity across all courts. But it is not equally uncommon. It has almost disappeared in the Supreme Court, but it is relatively more common in the lower courts, especially in the district courts. Accordingly, that version of the canon is among the most bottom-heavy canons, landing near the bottom of Figures 2 and 3.¹⁴⁴

Figure 1 shows that the rule of lenity, in all of its forms, appears at roughly the same rates in the published and unpublished decisions of the district courts. This is a departure from the usual pattern in which canons appear less often in unpublished opinions. Likewise, although unpublished opinions from the courts of appeals are not shown in the figures above, lenity is the rare canon that appears with any frequency in those opinions. This finding aligns with the expectations laid out earlier.¹⁴⁵ The relatively high representation of the rule of lenity in unpublished opinions likely reflects the fact that the calculus for criminal defendants, many of whom have free representation, often favors pursuing appeals even when the low odds of success would deter

Smith v. United States, 360 U.S. 1, 9 (1959) (referring to “the traditional canon of construction which calls for the strict interpretation of criminal statutes”).

143. See, e.g., Smith v. United States, 508 U.S. 223, 239 (1993) (“The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute.” (quotation marks, alterations, and citations omitted)). Dissents, especially those by Justice Scalia, have more often used the strict-construction formulation. Compare *Abramski v. United States*, 134 S. Ct. 2259, 2281 (2014) (Scalia, J., dissenting) (using that formulation), with *id.* at 2272 n.10 (majority opinion). For a rare modern example of the strict-construction formulation in a majority opinion, see *United States v. Lanier*, 520 U.S. 259, 266 (1997) (referring to “the canon of strict construction of criminal statutes, or rule of lenity”).

144. The difference in phrasing does not necessarily indicate a systematic difference in the rate at which criminal defendants win. Additional study would be required in order to determine whether that is the case.

145. See *supra* text accompanying note 103.

a paying litigant. A review of a small sample of these cases confirms that the vast majority of the citations of lenity in these cases are rejections of defendants' invocations of the rule.

2. *Varieties of Legislative History*. Given its importance in debates over interpretive methodology, legislative history merits separate comment. Figure 2 shows that legislative history, as a combined category, is neither especially top- nor bottom-heavy. When the combined category is disaggregated into its constituent parts, however, an interesting pattern emerges. Like the Supreme Court, lower courts use committee reports more heavily than the other types of legislative history.¹⁴⁶ That makes sense given the conventional hierarchy of legislative materials, which treats the reports of congressional committees (both subject-matter committees and conference committees) as the most valuable sources.¹⁴⁷ But lower courts use the other forms of legislative history under study—legislative hearings and floor debate—much less frequently than the Supreme Court.

Table 1 below illustrates these cross-court disparities. The use of congressional hearings declines especially steeply outside of the Supreme Court. I suspect that the explanation for this pattern has a few parts. First, congressional hearings have traditionally been relatively inaccessible in the familiar legal databases.¹⁴⁸ Second, attorneys may not identify the more obscure pieces of legislative history, and lower-court judges and their clerks have little time for independent research.

146. For studies of the Supreme Court showing that it uses committee reports more often than the other forms of legislative history, see ESKRIDGE ET AL., *supra* note 133, at 786; Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 237 (2010); Koby, *infra* note 190, at 387–90.

147. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring) (“Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared.”); WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 239–40 (2016); ROBERT A. KATZMANN, *JUDGING STATUTES* 18–20 (reprt. ed. 2014). A conference committee’s explanatory statement is particularly valuable when a bill has changed substantially since the committee stage. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 109–11 (2012).

148. Lexis now has an extensive and highly searchable collection in the form of the Congressional Hearings Digital Collection, but this development is only about a decade old. See *Status of Congressional Hearings Digital Collection Content Delivery*, LEXISNEXIS, <https://www.lexisnexis.com/help/CU/new.htm> [<http://perma.cc/22YD-LNQW>]. I suspect many judges and attorneys are unfamiliar with the database. Westlaw has less useful coverage. See *Committee Hearings on Bill, Including Testimony by Witnesses*, WESTLAW, <http://integrationsolutions.westlaw.com/aca/leghist/5.htm> [<https://perma.cc/RB4W-8ERM>].

Third, lower-court judges may not feel competent to piece together bits of evidence spread throughout the enactment process in order to achieve a complete understanding of the bill's enactment history. All of these factors push the lower courts toward extreme reliance on the traditional hierarchy that puts committee reports at the top of the heap.

Table 1: Citation Rates (%) for Different Kinds of Legislative History, by Court (2005–2014)

	SCt	CtApp pub	DCt pub	DCt unpub
Cmte. reports	34.1	17.0	11.2	2.7
Cong. Record	14.7	5.9	3.7	0.7
Cong. hearings	11.4	1.7	1.4	0.2

3. *Constitutional Avoidance.* Another canon that is particularly top-heavy is the canon of constitutional avoidance, which also happens to be a highly consequential and controversial canon.¹⁴⁹ I would not have confidently predicted this canon's top-heaviness, but one can plausibly explain it. First, there is relatively little room for constitutional doubts in the lower courts. The lower courts have their own circuit precedents resolving some constitutional questions, and more importantly, the Supreme Court's decisions bind them absolutely, with even the Court's dicta attaining nearly binding status.¹⁵⁰ The Supreme Court, on the other hand, has the power to overrule its precedents or, more commonly, to narrow or reframe them.¹⁵¹ Many more constitutional questions are therefore debatable in the Supreme Court than in the lower courts. Consequently, there are more opportunities for using the canon of constitutional avoidance. Second, the Court has more *need* for avoidance because the

149. See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2110–12 (2015); Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983).

150. See David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2042–49 (2013) (observing that today's lower courts only very rarely dismiss the Supreme Court's statements as dicta).

151. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–63 (2014).

significance of a decision striking down or upholding a statute is greater in the Supreme Court. As a result, more cases are eligible for and in need of the avoidance canon at the Supreme Court level.

The *Bond* litigation concerning the constitutionality of the federal chemical-weapons statute provides an illustration. The Third Circuit concluded that the statute clearly covered Mrs. Bond's conduct of using a dangerous chemical against her apparently adulterous neighbor.¹⁵² Avoidance of the constitutional question—namely, whether the statute was valid as an exercise of Congress's power to implement a treaty—was therefore not possible. The Third Circuit faced the question and upheld the statute on the authority of *Missouri v. Holland*.¹⁵³ In contrast, the Supreme Court majority in *Bond* avoided the constitutional question by holding that the statute did not apply to Bond's conduct.¹⁵⁴ It could be that the Supreme Court and the Third Circuit simply disagreed over how clear the statute was. But something deeper about the avoidance canon was probably at work as well. A Supreme Court opinion either repudiating *Holland* or reaffirming its federalism-threatening implications would have been a very, very big deal.¹⁵⁵ A court of appeals relying on *Holland*, on the other hand, is exactly what one would expect—a faithful application of Supreme Court precedent.

4. *Substantive Presumptions.* Although the avoidance canon is top-heavy, several of the policy-based substantive presumptions—those involving retroactivity, jurisdiction, extraterritoriality, and state sovereignty—enjoy relative prominence in the lower courts, including in unpublished district-court decisions. Based on my review of many cases, it appears that a meaningful proportion of the lower federal courts' uses of the presumption against retroactivity arise in the context

152. *United States v. Bond*, 681 F.3d 149, 153–55 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077 (2014). This was the second Third Circuit decision in the case, as the Third Circuit had previously ruled that Bond lacked standing to challenge the statute's constitutionality. *United States v. Bond*, 581 F.3d 128, 141 (3d Cir. 2009), *rev'd*, 564 U.S. 211 (2011). The Supreme Court reversed on standing, necessitating the second Third Circuit ruling.

153. *Id.* at 180; *see Missouri v. Holland*, 252 U.S. 416, 432 (1920) (stating that “[i]f the treaty is valid there can be no dispute about the validity of the statute” that implements it “as a necessary and proper means to execute the powers of the Government”).

154. *Bond v. United States*, 134 S. Ct. 2077, 2087, 2093–94 (2014).

155. *See, e.g.,* Lyle Denniston, *Argument Preview: New Look at Old Precedent*, SCOTUSBLOG (Nov. 2, 2013, 12:04 AM), <http://www.scotusblog.com/2013/11/argument-preview-new-look-at-old-precedent> [<https://perma.cc/FX3F-AUGH>] (“[T]he coming decision in *Bond v. United States* may wind up with a very prominent place in constitutional history It is, indeed, difficult to imagine how this case can be decided without making history.”).

of state legislation and often cite a state-law source for the rule.¹⁵⁶ Some uses of the extraterritoriality canon likewise involve state law, such as the question whether a state statute applies outside the state's borders.¹⁵⁷ The lower courts' need to interpret state law does not, however, explain the extreme bottom-heaviness of the canon calling for narrow construction of federal subject-matter jurisdiction. That canon's importance in the lower courts instead largely reflects judicial-structural considerations and perhaps differences in preferences across tiers of the judiciary. Hierarchical divergence in the use of substantive canons in general, and the jurisdiction canon in particular, warrant further consideration once all of this Part's results are in view.¹⁵⁸

D. The Matched-Corpus Method: Following the Same Cases at All Three Levels

Recall the distinction between *doing different things* and *doing things differently*. One objection to cross-tier comparisons like those presented above is that the bodies of cases encountered at different levels of the system are very different. *Of course* the Supreme Court decisions use many more canons and tools, one might say, because its docket is composed almost entirely of only the hardest, most debatable cases. Most statutory-interpretation decisions in the lower courts are easy. Limiting one's study to published opinions—which the lower courts reserve for the small minority of cases that are difficult or interesting—partly corrects for differences in case difficulty, but not completely. What we really want, the critic would say, is an apples-to-apples comparison: Do the decisions of the different courts still look so different when they are deciding closely comparable cases?

I think the critic's demand is misguided to a significant degree. Apples-to-apples comparisons are nice, but it is also very much worth knowing that apples, which predominate at the Supreme Court, make up only a small percentage of the fruit in the lower courts' basket, with the rest being composed of lemons and squishy bananas. The most important thing, when it comes to understanding the lower courts, might be the realization that there are so few apples to be found! That

156. *E.g.*, *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2007 WL 2962640, at *4 (N.D. Ind. Oct. 4, 2007) (Indiana law).

157. *E.g.*, *Russo v. APL Marine Servs., Ltd.*, 135 F. Supp. 3d 1089, 1094 (C.D. Cal. 2015) (California law); *Union Underwear Co. v. GI Apparel, Inc.*, No. CIV. A. 08-00124 (WHW) 2008 WL 3833475, at *4 (D.N.J. Aug. 13, 2008) (Kentucky law).

158. *See infra* Part II.G.

is, while we call all of these things courts, they are different institutions with different roles doing rather different things.

Nonetheless, the critic's request can be accommodated by using what I call the matched-corpus method.¹⁵⁹ This method compares the Supreme Court's decisions with the lower courts' decisions in the very same cases. To assemble this matched corpus, I collected all Supreme Court decisions interpreting statutes for the years 2011 through 2015 inclusive, 218 decisions in all.¹⁶⁰ I then collected the court of appeals opinion under review in each of those Supreme Court cases, along with the district-court opinion that led to that court of appeals case. One can then observe the same cases—the apples—as they proceed through each of the three levels of the judicial system. By looking at the same cases at different points in the process, the matched-corpus method neutralizes the biasing effect of the Supreme Court's case-selection processes. This method therefore reveals whether different kinds of courts do things differently even when they are doing the same things.

Locating the court of appeals opinions was not particularly difficult. A published or unpublished opinion was located for every case.¹⁶¹ The district courts did present some complications, but relevant opinions were located for the large majority of the cases. The goal was to obtain any reasoned written opinions that addressed the statutory-interpretive question later addressed by the Supreme Court. This required searching several sources, including Westlaw, Lexis,

159. Brudney and Baum use a similar technique to compare the use of dictionaries and legislative history in several selected areas of statutory law. See Brudney & Baum, *Protean Statutory Interpretation*, *supra* note 1, at 701–02; James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and Courts of Appeals*, 125 YALE L.J. FORUM 104, 104–05 (2015) [hereinafter Brudney & Baum, *Dictionaries 2.0*]. The study here examines more than a dozen interpretive tools and all areas of law, though for a shorter period of time.

160. I used a lenient standard for identifying the Court's statutory cases. Cases that, for instance, combined both statutory interpretation and constitutional law were included in the data set. See, e.g., *Smith v. United States*, 568 U.S. 106 (2013) (interpreting a statute to assign the burden of proof on an issue to the defendant and then holding the statute constitutional as so construed). Examples of the kinds of cases that were excluded were constitutional cases; cases applying common-law doctrines such as interstate water disputes, preclusion, and abstention; and those habeas and qualified-immunity cases (quite a few of which were summary reversals) that only concerned whether a certain right was “clearly established” by precedent. I excluded opinions on denial of certiorari, as those are not merits decisions. Also excluded were the relatively few cases that came from state courts, as this study concerns only comparisons between the Supreme Court and the lower federal courts.

161. A small handful of cases involved a direct appeal from a three-judge district court to the Supreme Court. In those rare cases, I treated the opinion of the three-judge district court as a decision from the court of appeals rather than the district court.

Bloomberg Law (which draws material from PACER dockets), and petitions for certiorari (the appendices to which include copies of any prior opinions in a case). In about 10 percent of the cases, there was no district-court decision to look for, as in petitions for review of agency action that begin in the courts of appeals. In a few more cases, a district-court opinion was located but was excluded because it did not or could not address the issue the Supreme Court addressed.¹⁶² In some cases, the district court's decision on the relevant question took the form of a one-line order deciding a motion or an oral ruling delivered during a hearing. These were not included in the quantitative analysis. In total, a relevant district-court opinion was located for about 80 percent of the Supreme Court decisions.¹⁶³

As one would expect, the lower-court decisions in the matched corpus are not at all typical of the output of the lower courts. Of the court of appeals cases in the matched corpus, slightly more than 85 percent generated published opinions, compared to a publication rate of about 15 percent for all decisions in the courts of appeals.¹⁶⁴ About 20 percent of the court of appeals cases in the matched corpus have dissents, which again far exceeds the usual dissent rate, which is less than 3 percent.¹⁶⁵ In the ordinary world, the large majority of cases do not yield any district-court opinion available on Lexis or Westlaw.¹⁶⁶

162. *E.g.*, *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902, 904 (2015) (addressing an issue of appellate jurisdiction raised *sua sponte* by the court of appeals).

163. In a few instances, the corpus contains more than one district-court decision from a case, such as where the district court addresses the same issue in one opinion and then addresses it again after a motion for reconsideration.

164. *Supra* note 101 and accompanying text.

165. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106 n.9 (2011) (reporting a court of appeals dissent rate of 2.6 percent for 1990–2007); *see also* Harry T. Edwards, Collegial Decision Making in the U.S. Courts of Appeals at *58 (Nov. 2017) (unpublished manuscript) (on file with the *Duke Law Journal*) (estimating a court of appeals dissent rate of 1.3 percent for 2011–16). Among published decisions, the dissent rate increases, but it remains far below the rate of dissents found in the matched-corpus data set. *See id.* (reporting a 10.6 percent dissent rate for published court of appeals decisions for 2011–16); *see also* JENNIFER BARNES BOWIE, DONALD R. SONGER & JOHN SZMER, *THE VIEW FROM THE BENCH AND CHAMBERS* 140 (2014) (reporting dissent rates in the range of 8–12 percent for published decisions from the mid-1970s to 2002).

166. *See* Christina L. Boyd, *Opinion Writing in the Federal District Courts*, 36 JUST. SYS. J. 254, 261–62 (2015) (reporting that 9 percent of the cases in her database yielded at least 1 opinion available on Lexis); Hoffman et al., *supra* note 124, at 693, 751 (reporting that 18 percent of the district-court cases in their database resulted in an opinion available on Lexis or Westlaw); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1138, 1143 (1990) (reporting that about 15 percent of employment-discrimination cases in their sample

But in the matched corpus, there is a reasoned opinion from the district court for the large majority of the cases, most commonly an unpublished opinion available through Westlaw or Lexis. Indeed, more than 10 percent of the cases in the matched corpus had district-court opinions published in the *Federal Supplement* or the other official West reporters (*Federal Rules Decisions* and *Bankruptcy Reporter*). This publication rate far exceeds the usual rate at which cases in the district courts generate officially published opinions.¹⁶⁷ These are the apples from the lower-court basket, in other words.

Once the matched-corpus database was assembled, it was searched for canons and other interpretive tools. Given the smaller number of cases and the opportunity for more fine-grained scrutiny, the matched-corpus analysis was able to include some tools, such as the common law, that were too difficult to locate reliably when relying only on large-*n*, electronic searches. As elsewhere, cases are counted as citing a canon even when the canon appears in a concurrence or dissent, and citations are counted regardless of how much weight the canon is ultimately given.¹⁶⁸ Citations that merely describe what another court did, however, are excluded, as are those that involve the interpretation of non-statutory texts.

Tables 2 and 3 present results for those tools that appeared more than 10 times in the Supreme Court opinions.¹⁶⁹ To use linguistic canons for purposes of exposition, Table 2 shows that those canons were used in 16 of the 218 Supreme Court opinions, but those canons appeared in only 9 of the court of appeals decisions. All of the tools

resulted in an opinion available on Lexis).

167. It is difficult to calculate publication rates for district courts because a case may present several opportunities for a published opinion, such as rulings on dispositive motions, post-trial motions, and remands after appeal. By the same token, cases in the district court may present *no* opportunities for a published opinion, as when a case quickly settles. Probably fewer than 5 percent of district-court cases yield any published opinion. *See* Boyd, *supra* note 166, at 262 (reporting that 9 percent of the cases in the data set had a written opinion, of which only slightly over a third—a total of about 3 percent—were published).

168. *See supra* Part II.B.1 (explaining why this Article does not make judgments about the weight of an opinion's reliance on particular canons). As before, these search terms are on file with the author.

169. The canons that returned fewer than 10 results include the presumptions against preemption, retroactivity, extraterritoriality, and implied repeal; the state-sovereignty clear-statement rule; *in pari materia*; and “no elephants in mouseholes.” For legislative history and deference regimes, the table includes a composite category as well as subcategories, even though some subcategories did not have more than 10 appearances. The category for committee reports includes conference committees. Lenity is included in Table 3 because it had more than 10 results in the larger corpus reflected in Table 2.

were, to varying degrees, less prevalent in the lower-court corpus. This again supports the hypothesis that Supreme Court decisions are more interpretively rich. Here, the effect persists even within the same cases.

Table 2: Frequency of Tool Use in the Supreme Court/Court of Appeals Matched Corpus (n = 218 Supreme Court opinions with matched court of appeals opinions)

	Supreme Ct. cases	Ct. Appeals cases¹⁷⁰	Matched sets
Dictionary	79	34.5	24
Any legislative history	80	59	30
<i>Congressional Record</i>	25	18	6
<i>Committee Reports</i>	66	55.5	23.5
<i>Hearings</i>	23	10	2
Surplusage/superfluity	42	25	8
Any deference regime	32	26	17
<i>Auer/Seminole Rock</i>	5	6	3
<i>Chevron</i>	22	22	14
<i>Skidmore</i>	13	7	3
Consistent usage/ meaningful variation	28	13.5	6.5
Common law	24	13.5	7
Absurd results	21	19	3
Const. avoidance	20	8	5
Linguistic canons	16	9	4
Lenity	12	3	1

Although there are substantial hierarchical divergences in interpretive complexity even within the matched corpus, it is worth noting that some of the gaps are narrower in the matched corpus than they are in the broader universe of all decisions. Recall from Table 1

170. Fractional citations are reported when one decision reviews multiple separate cases from the lower court and only some of the lower-court cases use the tool.

that citations to congressional hearings and the *Congressional Record* are extremely rare in the lower courts. Here we see that they are much more prevalent in the matched corpus. The data do not explain why. Since the matched corpus contains a disproportionate share of the hardest cases, it makes sense that courts would turn to more difficult and less authoritative sources for guidance. It is also possible that courts and attorneys realize that the case is a good candidate for certiorari and therefore engage in more exhaustive analysis.

The matched-corpus method also reveals whether the same tools are being used in the same cases at each level. A “matched set,” as reported in the far-right column, occurs when the same tool is used at both levels in the very same case. The tool with the best matching performance in the corpus was deference, *Chevron* in particular. But the general conclusion is that matches are rare. For example, of the 16 Supreme Court cases using a linguistic canon, the corresponding court of appeals used a linguistic canon in only 4 of them.¹⁷¹ The most common reason for a failed match is that a tool appeared for the first time in the Supreme Court. Recall *Yates v. United States*,¹⁷² the undersized-fish case described in the Introduction. The Supreme Court used, among other tools, a bevy of textual canons (*ejusdem generis*, *noscitur a sociis*, and *antisurplusage*), the *Congressional Record*, and the statute’s heading, none of which were found in the court of appeals’ decision. The only matches across the two iterations of *Yates*, among the tools studied here, were use of the dictionary and the rule of lenity.

The hierarchical disparities in canon frequency are even wider when one looks at the district courts. Table 3 presents the same kind of analysis as the previous table, but it includes only those Supreme Court cases in which a corresponding district-court decision existed and could be found, which is about 80 percent of the cases. As Table 3 shows, most tools are used much more often at the Supreme Court level. Tools with particularly steep drop-offs include constitutional avoidance and the holistic rule of consistent usage and meaningful variation. The tools that come closest to parity are deference and legislative history, which the Supreme Court uses only about twice as often as the district court. In both instances, however, the picture becomes more complex when

171. Recall that the category of linguistic canons is a composite of *ejusdem generis*, *noscitur a sociis*, *expressio unius*, and the rule of the last antecedent. In each of the four matches, both courts used the same canon. For legislative history, a match occurs even if courts use different kinds of committee reports. To some degree this grouping overstates the low level of cross-tier matching.

172. 135 S. Ct. 1074 (2015).

one disaggregates the tool into its different varieties. Within the category of legislative history, the use of committee reports is closest to parity, while the use of hearings and debates increases sharply as cases move up the appellate ladder. This finding reinforces the finding above¹⁷³ that the lower courts, especially the district courts, tend to focus on the most accessible and most authoritative kinds of legislative history, while the Supreme Court is more willing to examine more obscure sources.

173. *Supra* Part II.C.2.

Table 3: Frequency of Tool Use in the Supreme Court/District-Court Matched Corpus (n = 173.5 Supreme Court opinions with matched district-court opinions¹⁷⁴)

	Supreme Ct. cases	District Ct. cases	Matched sets
Dictionary	66	14.5	12
Any legislative history	63	27.5	15.5
<i>Congressional Record</i>	22	4.5	3.5
<i>Committee Reports</i>	50	25	11
<i>Hearings</i>	18	1	0
Surplusage/superfluity	35	7	6
Any deference regime	25	10	7
<i>Auer/Seminole Rock</i>	5	2.5	2.5
<i>Chevron</i>	15	8	5
<i>Skidmore</i>	12	2.5	1
Consistent usage/ meaningful variation	22	1	0
Common law	15	2	1
Absurd results	15	5	3
Const. avoidance	15	1	0
Linguistic canons	14	2	0
Lenity	6	1	1

As Table 3 also shows, the number of matched sets—that is, instances in which the same canon is used in the same case in the district court and Supreme Court—is staggeringly low for most tools. For the cases in which the Supreme Court ultimately used a linguistic canon, a legislative hearing, or the avoidance canon (14, 18, and 15 Supreme Court cases, respectively), the district courts had used those tools in *none* of the same cases. I would not have expected such a high degree

174. The number of Supreme Court opinions includes half a case because in one of the Supreme Court decisions reviewing two separate cases, only one of the district-court cases had an opinion.

of methodological discontinuity within cases. This discontinuity raises rule-of-law concerns about predictability, as explored further below.¹⁷⁵

Even the matched-corpus method overstates, to a degree, the similarity between courts. Litigation typically narrows in scope as it moves up the appellate pyramid. In a complicated case, the district court might resolve dozens of contested matters, but only a few of those rulings are challenged in the court of appeals, and the Supreme Court ordinarily addresses only one of them.¹⁷⁶ The matched corpus includes only the opinion from the lower court that addresses the eventual certiorari issue, not any other opinions in the case. But some of the included opinions discussed multiple issues, including multiple interpretive issues, besides the certiorari issue.¹⁷⁷ I did not excise the portions of the opinion dealing with other questions. If the lower-court corpus were restricted to only the parts of the decisions discussing the certiorari issue, the lower-court portion of the corpus would be even more canon poor than it is now.¹⁷⁸

A final comment on the matched corpus concerns unpublished decisions. The difference between the published and unpublished court of appeals decisions in the corpus is stark. In the unpublished opinions, interpretive tools other than precedent are almost entirely absent. The large majority of the unpublished decisions were short and relied on precedent, most often circuit precedent. At the district-court level, tools other than precedent were less common in unpublished decisions, but the distinction between the two types of opinions was not nearly so dramatic. That the unpublished opinions of the courts of appeals are so interpretively impoverished likely reflects the fact that the courts of appeals unilaterally control publication status, use different processes for the two types of opinions, and give them entirely different precedential status.¹⁷⁹

175. *Infra* Part II.G.

176. A counterexample is *Kiobel v. Royal Dutch Petroleum Co.*, where the Supreme Court ordered reargument to address a new question not litigated below. 569 U.S. 108, 114 (2013). This is rare, because the usual rule is that a reviewing court does not consider new issues.

177. An extreme example is *Smith v. United States*, 568 U.S. 106, 109 (2013), in which the Supreme Court considered only one question about conspiracy law, while the court of appeals had issued a lengthy opinion that discussed more than 20 constitutional, statutory, procedural, and evidentiary matters. *United States v. Moore*, 651 F.3d 30, 38 (D.C. Cir. 2011).

178. Trimming the lower-court opinions would also affect the amount of matching. It would slightly reduce the number of cases in which a canon used below disappeared when the case reached the Supreme Court. It would slightly increase the number of cases in which new canons showed up for the first time in the Supreme Court.

179. *See supra* notes 101–02 and accompanying text.

E. Comparing Textualist Trends at All Three Levels

Interpretive approaches need not remain static over time. They can change, both in terms of the theoretical goal of interpretation and in terms of the particular tools that are most important. One notable shift is that the Supreme Court's interpretive tools are more textualist in orientation today than they were several decades ago.¹⁸⁰ This section considers whether the lower courts, especially the vastly understudied district courts, also underwent a textualist shift. The period under study for this section is 1975 to 2016.

As stated above, interpretive approaches are distinguished in practice by which interpretive tools they emphasize.¹⁸¹ Probably the most readily apparent feature of the new textualism championed by Justice Scalia and others is its extreme skepticism toward the use of legislative history.¹⁸² The aversion toward legislative history is matched with a preference for text-based interpretive tools, including whole-act arguments and linguistic canons.¹⁸³

Previous work has shown that the federal courts of appeals shifted toward at least some textualist tools over the last several decades. In particular, the courts of appeals started to increase their use of linguistic canons around 1990, and as a result, they use such canons about twice as often today as they did 30 years ago.¹⁸⁴ That pattern roughly matched a similar trend in the Supreme Court, though the Supreme Court's increase apparently started a few years earlier and

180. See ESKRIDGE ET AL., *supra* note 133, at 592–93; Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017). This is not to say that the Court today is full of committed textualists. On the contrary, the Court as a whole did not adopt Justice Scalia's boldest theoretical propositions, and it may be that the most significant recent development in Supreme Court statutory interpretation is a textualist-purposive synthesis that has quieted the methodological battles. See *id.* at 859, 874; see also John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113–82 (2011) (describing the development of a new, “textually structured” version of purposivism). Even if the textualist wave has crested, the Court is still more textualist today than it was 40 years ago, especially in terms of the *tools* that the Court emphasizes, which is the focus here.

181. *Supra* Part II.A.

182. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–30 (1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60–66 (1988); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24, 650–56 (1990); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 361–62 (2005).

183. See, e.g., *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (making the now-famous statement that “[s]tatutory construction . . . is a holistic endeavor”); SCALIA, *supra* note 182, at 25–27; Eskridge, *supra* note 182, at 660–64.

184. CROSS, *supra* note 1, at 190–91; Bruhl, *supra* note 1, at 499–506.

was much steeper, such that the Court currently uses linguistic canons substantially more frequently than the courts of appeals.¹⁸⁵ Something similar happened with dictionaries in recent decades; their use has increased dramatically in the Supreme Court and increased somewhat in the courts of appeals.¹⁸⁶ Existing research also shows that the courts of appeals, over the same time period, reduced their use of legislative history.¹⁸⁷ These changes—linguistic canons and dictionaries up, legislative history down—indicate a shift toward textualist methodology in the courts of appeals.

In light of those findings, we might wonder how these changes affected the district courts. Did this same pattern occur in the district courts? If so, roughly when? And what about other indicators of textualism, like the whole-act rule? Did both published and unpublished opinions change? The short answer to those questions is that pro-textualist patterns exist at each level, though the textualist shift is less pronounced as one moves down the judicial hierarchy from the Supreme Court to the courts of appeals to the district courts. Further, the shift toward textualist tools was stronger in published opinions than in unpublished ones.

This Section measures the rise of textualism at different levels of the judiciary over a period of 40 years by tracking patterns in the use of legislative history, linguistic canons, holistic-textual tools, and dictionaries. For purposes of this study, the use of legislative history is defined as citations to committee reports (including conference committees), the *Congressional Record*, and congressional hearings. There are other forms of legislative history, of course, but this list includes the most important category, namely committee reports, and all of the items on the list are particularly easy to identify through electronic searches. The category of linguistic canons is composed of four familiar rules of word association and grammar: *ejusdem generis*, *noscitur a sociis*, *expressio unius*, and the rule of the last antecedent. All of these linguistic canons can be captured with good accuracy through electronic searches. The search for holistic-textual tools is meant to capture a set of canons that encourage courts to draw inferences from the whole act or even other statutes, namely the rule

185. Bruhl, *supra* note 1, at 499–506.

186. Brudney & Baum, *Dictionaries 2.0*, *supra* note 159, at 105; John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 497–502 (2014).

187. CROSS, *supra* note 1, at 183–87; Parrillo, *supra* note 121, at 389.

of consistent usage and meaningful variation,¹⁸⁸ the *in pari materia* canon, and the rule against surplusage. These holistic-textual tools are a bit harder to search for, and the search terms are likely underinclusive, but that should be true across courts and time periods. Dictionaries include both legal and general dictionaries. For each tool, the searches are intended to capture their use in statutory interpretation while excluding uses in other contexts like contract interpretation (which is common in the lower courts' diversity docket) or constitutional interpretation.

The following figures present the results for the period spanning from 1975 to 2016. For each court, there are markers showing the citation rate for each year and a smoothed curve that is meant to ease visualization by showing the trend over time.¹⁸⁹ The curve for the Supreme Court is thicker to visually signal the greater variability in the Court's annual rates, which stems from the Court's small docket size. The figures separately display published and unpublished district-court decisions. Unpublished decisions from the courts of appeals are omitted throughout this Section because they very rarely include any of the tools at issue. Note that the vertical scales of the figures differ, as some of the tools are more prevalent than others.

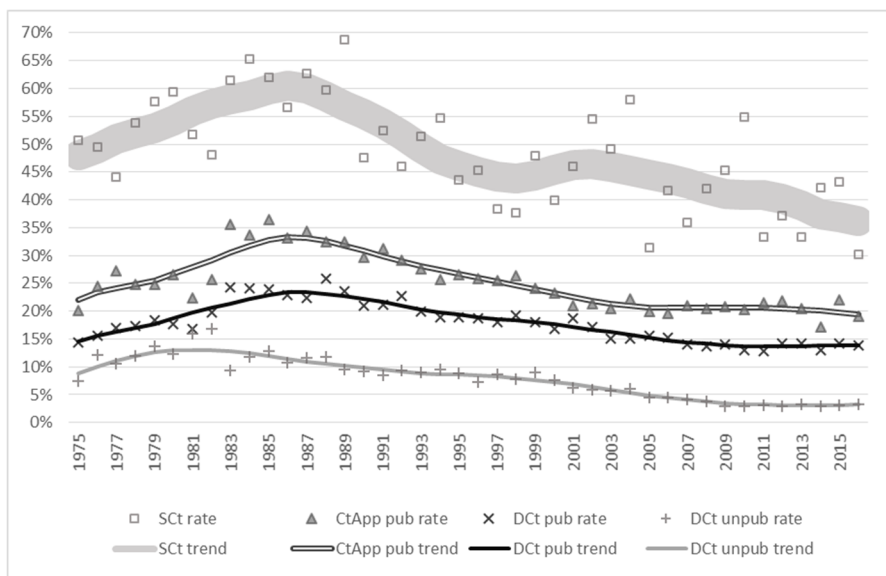
Figure 4 shows legislative history, the tool most disfavored by textualists. Previous work has traced the use of legislative history by the Supreme Court and, to a much lesser degree, the courts of appeals.¹⁹⁰ This study brings in the district courts and compares their practices to those of the higher courts. As Figure 4 shows, the use of legislative history reached a recent peak at all three levels in the mid-to late-1980s and has declined since then. The citation rate is substantially higher in the Supreme Court, but the trends are parallel across all three levels.

188. This canon instructs that the same language in different sections or statutes should be given the same meaning, and different language given different meaning.

189. The smoothed lines in the figures reflect locally weighted regressions (known as LOWESS or LOESS) calculated with a modest smoothing factor of 0.33. See WILLIAM S. CLEVELAND, *THE ELEMENTS OF GRAPHING DATA* 168–72 (rev. ed. 1994) (describing the technique). LOWESS smoothing can be performed with statistics packages or an Excel add-in.

190. For the Supreme Court, see, for example, Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 384–87 (1999); Law & Zaring, *supra* note 93, at 1716 fig.5. For studies of the courts of appeals, in some cases with comparisons to the Supreme Court, see, for example, CROSS, *supra* note 1, at 183–87; Brudney & Baum, *Protean Statutory Interpretation*, *supra* note 1, at 700–11; Parrillo, *supra* note 121, at 365–66.

Figure 4: Use of Legislative History in Different Courts, Annual Citation Rates and Trends, 1975–2016



The next several figures show the use of the three tools favored by textualists, namely dictionaries, holistic-textual tools, and linguistic canons. At the start of the period under study, all three courts used these tools at similar rates. In the Supreme Court, the use of all three tools began to increase in the 1980s, though the variability in the yearly data makes it hard to pinpoint the precise turning point. The Court's citation rate is now much higher than it was several decades ago. The increase is also present in the lower courts' published opinions, but it was not as sharp and perhaps started a bit later. Within the lower courts, the increase was larger for the courts of appeals than for the district courts.

Figure 5: Use of Dictionaries in Different Courts, Annual Citation Rates and Trends, 1975–2016

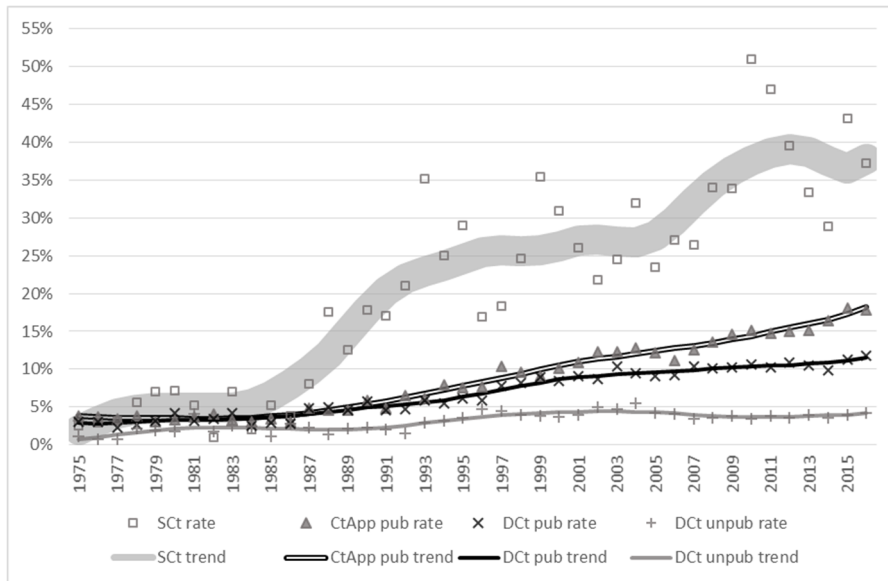


Figure 6: Use of Holistic-Textual Canons, Annual Citation Rates and Trends, 1975–2016

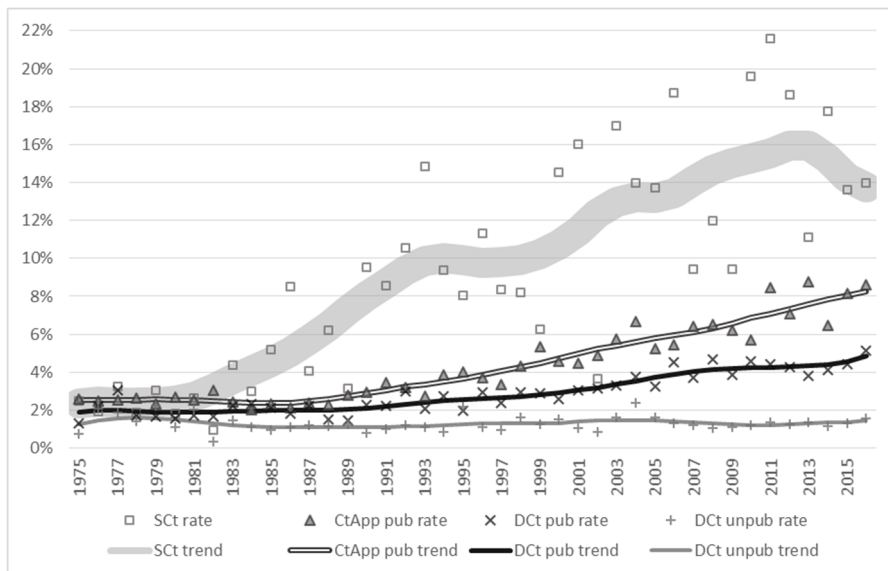
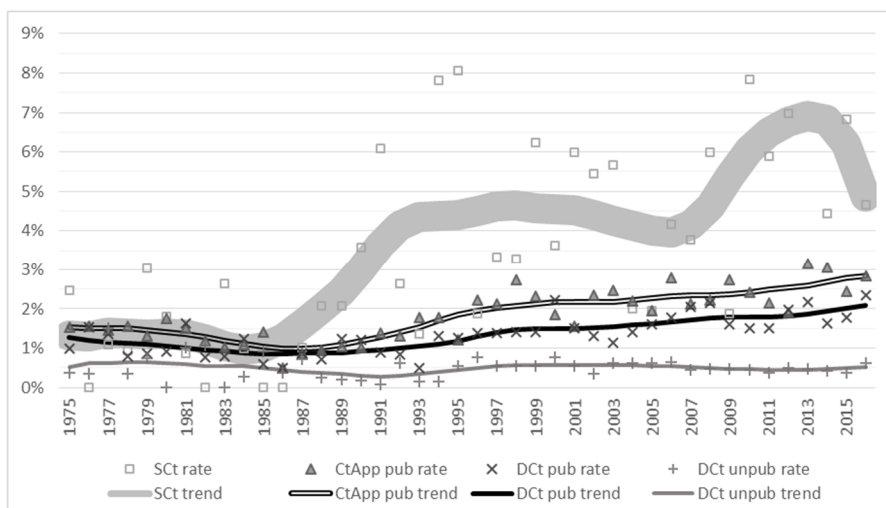


Figure 7: Use of Linguistic Canons, Annual Citation Rates and Trends, 1975–2016¹⁹¹



In the district courts, the increase in the use of textualist-oriented tools manifested itself in published opinions, but the citation rate in the unpublished opinions, which are much more numerous, was essentially flat for 40 years. This divergence between published and unpublished opinions requires some comment. First, recall that district-court decisions are selected for publication when the authoring judges and West’s attorneys believe that they have broad significance.¹⁹² The results show that the *important* decisions—those that address questions of first impression, for example—use textualist tools more than they used to. Second, although the citation rates in unpublished opinions remained fairly steady, the raw numbers of uses of the canons did increase a great deal over time. The rate remained steady because the denominator—that is, the number of unpublished interpretive decisions available through Westlaw—increased sharply from about 300 in 1980 to over 12,000 for each of the last several years. The district courts are busier than they used to be, but most of that massive increase in the denominator reflects the fact that a greater proportion of their decisions now make their way to Westlaw.¹⁹³ To be included in my

191. For the sake of visualization, the figure omits the 2013 data point for the Supreme Court, which is an outlier at 13 percent. It was included when calculating the trendline.

192. *Supra* text accompanying note 105.

193. *See supra* note 128 (describing a huge jump in the number of unpublished decisions around 2005).

denominator, a decision must include at least some discussion of statutory interpretation.¹⁹⁴ Nonetheless, it may be that Westlaw's more capacious collection methods mean that the average unpublished interpretive decision on Westlaw today is less complicated than the average unpublished interpretive decision on Westlaw from the past.¹⁹⁵ If that is so, then it may be that Westlaw's more exhaustive collection methods are masking an increased propensity over time to cite textualist tools in *otherwise similarly significant* unpublished opinions. Similar forces could make the drop in the use of legislative history in unpublished decisions look somewhat more pronounced than it really is.

The focus of this study is how interpretation differs across courts, not causal mechanisms, but it is natural to speculate about what caused the textualist shift seen above. Were the lower courts responding to changes at the Supreme Court, or more specifically to Justice Scalia's crusade against legislative history on and off the bench? Does the credit go to President Reagan's picks for the lower courts and his Department of Justice's textualist litigation strategies?¹⁹⁶ Were trends in the broader legal culture influencing all actors at once? One needs to be cautious in making causal claims. Nonetheless, the partisan makeup of the lower courts does not appear to explain the shift.¹⁹⁷ Reagan-appointed judges might explain the initial change, but the change persists in the Clinton and Obama eras. Textualism is a bipartisan phenomenon. Indeed, although this is anecdotal, some of the most text- and canon-heavy interpretive battles in the last few Supreme Court terms have involved duels between Democratic

194. See *supra* Part II.B.2.

195. To test that intuition, I compared the unpublished district-court cases in the denominator for 1990 and 2015 to see what proportion of those cases was made up of (1) *pro se* cases and (2) cases in which prisoners seek noncapital habeas relief or resentencing. Those are two categories particularly likely to involve settled law or frivolous claims. Cf. FED. JUDICIAL CTR., 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY 5 tbl.1 (2005) (assigning very low workload weightings to noncapital habeas and resentencing proceedings). The 2015 cases contained much higher proportions of both kinds of cases.

196. See OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION i, v (1989) (casting doubt on the validity of legislative history as an interpretive source).

197. See CROSS, *supra* note 1, at 185–86 (showing that the periods with more heavily Republican courts of appeals do not closely align with the periods of increasing textualism); see also Gluck & Posner, *supra* note 1, at 1311–12 (reporting that younger judges were more canon oriented and formalist than older judges, regardless of their appointing president).

appointees.¹⁹⁸

Subject to confirmation and refinement by other evidence, the results above support at least three tentative conclusions. First, the lower courts generally paralleled the Supreme Court in deemphasizing legislative history and increasing their use of linguistic and holistic-textual canons and dictionaries. Second, the changes in the lower courts were not as dramatic in magnitude.¹⁹⁹ Whatever its shifting fortunes in the Supreme Court, textualism did not conquer the lower courts. Third, the use of legislative history and characteristically textualist canons is highest by far in the Supreme Court and lowest in the district courts and, within the district courts, lower in their unpublished opinions than in their published opinions. This last cross-tier disparity once again supports the general hypothesis that lower courts' interpretive approaches are simpler in that all tools of interpretation, besides precedent, would appear less often.

F. The Lifecycle of a Federalism Canon

Some canons may be timeless, or at least old enough and Latin sounding enough that they seem timeless. But other canons have been born within living memory. The phenomenon of interest here is the "digestion" of a new canon through the judicial system—that is, the way a canon begins at the top of the judicial hierarchy and then diffuses through the system.

It is hard to identify clear breaks in interpretive rules that could be used to test the digestion hypothesis. Probably the best modern candidate is the Rehnquist Court's creation of powerful federalism clear-statement rules out of what had previously been presumptions against preemption and interference with state sovereignty.²⁰⁰ Some invocations of the federalism clear-statement rules are hard to pin down, as they can blend into ordinary preemption at the margins. For

198. *E.g.*, *Lockhart v. United States*, 136 S. Ct. 958 (2016) (dueling opinions from Justices Sotomayor and Kagan); *Yates v. United States*, 135 S. Ct. 1074 (2015) (dueling opinions from Justices Ginsburg and Kagan); *see also* Elena Kagan, *The Scalia Lecture*, at min. 18 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/ND8F-QSJD>] (describing herself as a textualist).

199. This finding aligns with other dictionary studies, which found that the Supreme Court's affection for dictionaries far outstrips the lower courts' use of that source. *Supra* note 186 and accompanying text (discussing findings of Brudney, Baum, and Calhoun).

200. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992) (discussing the development of these canons).

the sake of reliable searching, this Section focuses on one precisely definable version of the canon, which governs federal statutes that abrogate state sovereign immunity.²⁰¹ It is likely that some other canons would display similar dynamics.

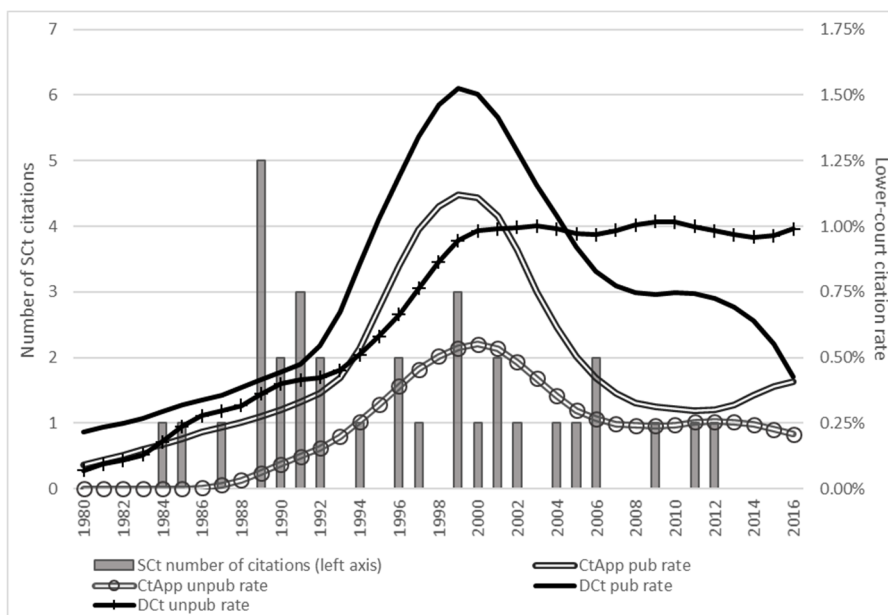
The data provide some support for the digestion hypothesis, as Figure 8 shows. The bars in the figure show the number of times the Supreme Court used the canon each year.²⁰² The Supreme Court issued a burst of decisions using the state-sovereignty canon around 1990, but the Court's use of the canon was already declining by the time its use peaked in the lower courts around a decade later. During those peak years in the lower courts, the canon was more common in published opinions than in unpublished ones, which is what one would expect. Today, the canon has a strange citation profile, as the canon is especially prominent in *unpublished* district-court decisions. This pattern is consistent with a scenario in which the Supreme Court's actions initially generate a need for novel applications and refinements of the canon, and then the canon becomes more routine and hemmed in by precedents.

201. *E.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (stating that “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute”).

202. The number of Supreme Court citations is used instead of rates for two reasons. First, one cannot present a very meaningful annual rate given the small numbers involved. Second, for the lower-court judges observing the Supreme Court’s work, it is not clear whether citation rates or raw numbers are more salient.

Because the Supreme Court data in Figure 8 are expressed in raw numbers, this figure cannot be used to compare the rate at which the Supreme Court cites the canon against the rates at which the lower courts cite it. Citation rates and ratios can be compared using Figures 1–3 above. Over the last decade, the Court’s overall citation rate is higher than the citation rates in the lower courts, though not vastly so.

Figure 8: Use of State-Sovereignty Canon in Different Courts, 1980–2016²⁰³



G. Summary of Key Findings

It is time to summarize the key findings from the analyses above, discuss their implications, and compare the results to the predictions from Part I.

When it comes to statutory interpretation, the lower courts—especially the district courts—are both *doing different things* than the Supreme Court and *doing things differently*. They do different things in that the lower courts rarely encounter the difficult interpretive questions of first impression that the Supreme Court regularly confronts. Therefore, it is not surprising that virtually all of the interpretive tools of first impression—legislative history, linguistic inferences, substantive canons, and the rest—appeared far less often in the lower courts. The paucity of canons is especially pronounced in their unpublished opinions. But even when courts at different levels do confront similar cases, as in the matched-corpus study, lower courts still behave differently in several respects. We repeatedly see, for one thing, that their interpretive methods remain simpler in that fewer tools, aside

203. To ease visualization, the citation rates are displayed using LOWESS smoothing with the smoothing parameter set to 0.33. See *supra* note 189 (describing the LOWESS technique).

from precedent, are used at lower levels of the judicial system.

In addition to differing in how intensively they use interpretive tools overall, courts also differ with respect to *which* tools are most and least common at different levels of the system. To generalize, the more complicated the canon, the more overrepresented it is likely to be in the Supreme Court's opinions. For example, several holistic-interpretation canons are highly overrepresented in the Supreme Court; these include the presumptions of consistent usage and meaningful variation, the presumption against implied repeal, and the "no elephants in mouseholes" rule. By contrast, some of the traditional substantive canons and presumptions—which operate as handy judicial shortcuts—are relatively well represented in the lower courts.²⁰⁴ Legislative history falls near the middle, but courts differ in how often they use different types of legislative history. All courts use committee reports the most, but the Supreme Court, unlike the lower courts, makes substantial use of less accessible and authoritative forms as well.²⁰⁵

The most top-heavy canon in the study—that is, the one most overrepresented in the Supreme Court as compared to lower courts—is the "no elephants in mouseholes" canon. Several different drivers of divergence all push this canon toward top-heaviness. To begin with, although the idea behind the canon appeals to timeless common sense, the named canon is fairly new.²⁰⁶ As a result, the lower courts and attorneys were still learning about it during the study period.²⁰⁷ But even aside from its novelty, other features of the canon suggest that it will remain particularly top-heavy. The canon is complex in that it requires an assessment of the importance of one statutory provision as measured against the goals of the larger regulatory regime of which it is a part. And as a tool that applies paradigmatically to major disputes in administrative law, the opportunities to use it increase, relative to caseload, as one climbs the judicial hierarchy.

At the opposite end of the spectrum, the canon calling for narrow interpretations of jurisdictional statutes is extremely bottom-heavy. Although it is one of the most commonly used canons in the lower federal courts, it is not very common in the modern Supreme Court. Perhaps for that reason, this canon is also relatively unknown to

204. *Supra* Part II.C fig.2.

205. *Supra* Part II.C.2.

206. Its first appearance was in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

207. See Bruhl, *supra* note 1, at 543–45 (describing the early spread of the canon).

legislation scholars, drawing much less scholarly attention than the top-heavy elephant canon.²⁰⁸ The jurisdiction canon's extraordinary bottom-heaviness is largely attributable to structural factors like limited appeal opportunities and the Supreme Court's discretionary docket. Some of the disparity may also reflect divergent preferences: the lower courts have caseload-lightening reasons to narrow access to federal courts, while the current Supreme Court may favor broad federal jurisdiction so that it can expand its menu of certiorari petitions or increase federal control over wayward state courts.²⁰⁹

Over time, the lower courts' interpretive practices generally shift in line with trends in the Supreme Court's practices, but not perfectly. Sometimes there are lags as new developments, such as the Rehnquist Court's new federalism canons, diffuse through the system. Further, the textualist turn that started in the mid-1980s—one of the most significant changes in the Supreme Court's interpretive practices—was less drastic at each step down in the judicial system. To be sure, the lower courts now use legislative history much less than they did in the mid-1980s.²¹⁰ Yet we now have robust evidence that the Supreme Court's contemporaneous big shift toward textualist tools—linguistic canons, holistic-textual inferences, and dictionaries—was more muted in the lower courts, especially in the district courts.²¹¹ This finding broadly coheres with Brudney and Baum's conclusion that the lower courts' interpretive methods remain eclectic as compared to the dictionary-obsessed monoculture toward which the Supreme Court sometimes seems headed.²¹²

These results require us to qualify some noteworthy recent scholarly findings that were based on Supreme Court practice. For example, Eskridge and Baer found that the Supreme Court's cases involving deference to agency interpretations frequently cite amicus briefs filed by agencies and the Solicitor General.²¹³ Further, they found that the government has a very high win rate in such cases, which is surprising given the informality of that form of agency

208. Compare Bruhl, *supra* note 1, at 542–46 (describing the rise and crystallization of the elephant canon), with Bruhl, *supra* note 89, at 504 (noting that the jurisdiction canon has “escape[d] the notice of Supreme Court-oriented scholarship”).

209. *Id.* at 553–55.

210. *Supra* Part II.E fig.4.

211. *Supra* Part II.E figs.5, 6 & 7; see also sources cited *supra* note 186 (previous studies of the use of dictionaries by the Supreme Court and courts of appeals).

212. Brudney & Baum, *Protean Statutory Interpretation*, *supra* note 1, at 687–89, 752.

213. Eskridge & Baer, *supra* note 83, at 1098–99, 1111–15.

interpretation.²¹⁴ The results above show that lower courts rarely cite such briefs, likely because such briefs are so rarely available at earlier stages of litigation. The fact that the Supreme Court relies on agency interpretations that did not exist at the time of the lower court's decision raises normative questions about whether it is appropriate for the universe of admissible interpretive materials to expand after a grant of certiorari.²¹⁵

Recent work on the Roberts Court by Anita Krishnakumar shows that substantive canons are used rather little compared to other tools,²¹⁶ but the results from the lower courts reveal a more complicated picture. The avoidance canon is indeed rare in lower courts for reasons discussed above,²¹⁷ but several of the substantive presumptions—against retroactivity, against extraterritoriality, against federal jurisdiction, and against abrogation of state immunity—are overrepresented in the district courts, the courts of appeals, or both.²¹⁸ In part, this difference is due to the lower courts' diversity docket. Several of the traditional substantive canons—such as the presumption against retroactivity—have state-law cognates that are employed with some frequency by the lower federal courts. It is also worth noting that the chief users of some substantive canons, including the state-sovereignty clear-statement rule, vary over time. The Roberts Court has been a quiet period for federalism canons compared to the Rehnquist Court, but lower courts still spend some time working through the federalism canons' implications.²¹⁹

The study also highlights yet another complexity in courts' statutory-interpretation practices. Everyone knows that interpretive practices are far from uniform.²²⁰ The matched-corpus study shows that different canons are often invoked within the same case as it moves through the judicial system.²²¹ Usually that is because the Supreme Court's opinion introduces tools not used below, though sometimes tools used below disappear as the case progresses. This discontinuity

214. *Id.* at 1143–44.

215. *See* Bruhl, *supra* note 22, at 463–65.

216. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 825 (2017); *see also id.* at 893–95 (reporting that the Supreme Court, from 2006 to 2012, used language canons more often than substantive canons).

217. *Supra* Part II.C.3.

218. *Supra* Part II.C.4.

219. *Supra* Part II.F.

220. *See supra* text accompanying note 30.

221. *Supra* Part II.D.

threatens the hope that the canons, while rarely outcome determinative, can at least form a more or less reliable “interpretive regime.” As Eskridge and Frickey wrote,

An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes’ scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities [B]y rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law.²²²

Even if there is a somewhat reliable interpretive regime at the Supreme Court level, the matched-corpus results show that there may not be a predictable regime across courts, even within the life of given case. In addition, this discontinuity may reinforce the growth of the specialist Supreme Court bar composed of attorneys who know the Court’s interpretive language.²²³

A relative bright spot in terms of predictability is the *Chevron* doctrine of deference to agency interpretation. Of all the tools under study, it had the highest rate of matched sets. A potential explanation is that *Chevron* provides a relatively straightforward, universally known framework for analysis in agency cases. It can serve this function of structuring argument whether or not it predictably dictates results, and indeed the framework’s ability to accommodate pro- and anti-agency rulings may contribute to its prevalence.²²⁴

III. CONCLUSIONS AND FUTURE DIRECTIONS: WHAT INTERPRETIVE DIVERGENCE MEANS FOR SCHOLARS, COURTS, TEACHERS, AND ADVOCATES

The results described above reveal a degree of divergence in the interpretive methods used at different levels of the federal judiciary. Lower courts use almost all the interpretive tools, apart from precedent, less than the Supreme Court. More interestingly, courts

222. William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

223. See generally Lazarus, *supra* note 37 (observing the growing dominance of the Supreme Court bar).

224. Cf. Adrian Vermeule, *Chevron as a Legal Framework*, JOTWELL (Oct. 24, 2017) (reviewing Kristin Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 5 (2017)), <https://adlaw.jotwell.com/chevron-as-a-legal-framework> [<https://perma.cc/N52H-2597>] (describing *Chevron* as a doctrinal and rhetorical framework that serves a coordinating function of “provid[ing] a common language” for the articulation of competing perspectives).

emphasize different tools. The tip of the iceberg, the Supreme Court, is not representative of the whole.

This Article's findings have implications for several audiences. These findings can help scholars evaluate normative prescriptions and identify future lines of research. The findings might suggest that the Supreme Court and other courts should change their practices. The findings are also useful for advocates and their professors. The following pages address the implications of interpretive divergence for each of those audiences.

A. *Implications for Scholars*

The findings presented above provide a basis for assessing normative prescriptions aimed at the lower courts. I argued in previous work that lower courts should use simpler methods of statutory interpretation than the Supreme Court in recognition of their institutional constraints, which include the need to handle more cases in less time and with weaker briefing.²²⁵ That recommendation to simplify means, among other things, that the lower courts should rely less on complicated whole-code structural arguments and legislative history and rely more on other decisionmakers like higher courts and administrative agencies.²²⁶ The results here, together with other research, show that the lower courts follow these recommendations in several respects. The lower courts rely heavily on precedent, including nonbinding dicta,²²⁷ and they also use the *Chevron* deference doctrine regularly and probably more faithfully than the Supreme Court.²²⁸ The lower courts engage in complicated holistic-textual analysis relatively rarely.²²⁹

The aspect of lower-court interpretation that does not fit my previous normative prescription as well is their use of legislative history, which remains high in absolute terms, though only about half

225. Bruhl, *supra* note 22, at 470, 494–95.

226. *Id.* at 474–84; *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 1 (2006) (arguing from institutional premises that all courts should use simple interpretive methods).

227. *See, e.g., supra* Part I.B.C.3 and text accompanying note 179; *see also* Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 597, 610, 613 (2017) (showing that district courts now cite precedent, especially circuit precedent, much more heavily and deferentially than they did in the past).

228. *See supra* Part II.C figs.1 & 2; *see also* Barnett & Walker, *supra* note 107, at 3–6 (arguing that the courts of appeals take *Chevron* more seriously than the Supreme Court does).

229. *Supra* Parts II.C, II.D tbl.3.

as frequent as it used to be.²³⁰ A closer look, however, shows that the lower courts' use of legislative history is, even more than the Supreme Court's, heavily tilted toward committee reports rather than floor debates or legislative hearings.²³¹ This makes sense because piecing together a patchwork of speeches, colloquies, and witness statements into a probative picture of a statute's intent is a particularly tall order for pinched lower courts.²³² It is an important open question whether the dominance of committee reports will and should persist in an era of unorthodox lawmaking characterized by omnibus legislation, emergency legislation, and massive last-minute amendments—a world in which committee reports are less valuable, when they even exist.²³³ Justice Jackson's "committee reports only" compromise²³⁴ seems increasingly impracticable.

These findings also have implications for the scholarly movement for methodological stare decisis. The conventional view is that interpretive methodology does not receive ordinary stare decisis effect, but some scholars advocate changing that.²³⁵ Even in the absence of a comprehensive, well-established system of methodological stare decisis, the results here show that the lower courts still respond to, or at least roughly parallel, the interpretive practices and shifts of the Supreme Court.²³⁶ But if the federal judicial system is quasi-precedential already, then there is not much room for a formal precedential system to bring greater alignment. Furthermore, to the extent there are real differences across courts—and there certainly still are—those differences are not entirely traceable to the lack of a formalized system of precedent. They are, instead, at least partly the result of hardwired, structural features of the judicial system. That suggests that some meaningful amount of interpretive divergence is

230. *Supra* Part II.E fig.4.

231. *Supra* Part II.C.2.

232. Bruhl, *supra* note 22, at 474–76.

233. See generally Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1799–1826 (2015) (summarizing the rise of various kinds of non-textbook lawmaking processes).

234. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring).

235. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872–97 (2008); Gluck, *supra* note 1, at 1754, 1765–66, 1848–55; Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis As Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 705–08 (2008).

236. *Supra* Part II.E.

going to endure.²³⁷

The centrality of precedent in the lower courts' interpretive practices highlights the value of more work on that topic. Until recently, precedent's role in the statutory-interpretation literature has been highly compartmentalized in that scholars have focused largely on the problem of when a court may overrule one of its own on-point precedents.²³⁸ Precedent did not have a place on the original version of Eskridge & Frickey's iconic "funnel of abstraction," which provides a structure for their account of eclectic interpretation.²³⁹ At the very bottom of the funnel, which is reserved for the most concrete and authoritative sources, is statutory text.²⁴⁰ Next is legislative history.²⁴¹ That arrangement of sources becomes more understandable when one recalls that the funnel was originally developed in an attempt to explain *Supreme Court* statutory interpretation.²⁴² Recent iterations of the funnel now give a prominent place to precedent.²⁴³ Still, precedent plays many roles in statutory interpretation, especially in lower courts—binding authority, persuasive authority, a source of analogies, a source for authoritative statements of statutory purposes, a source for interpretive principles, and more.²⁴⁴ There is much to learn here.

This Article's findings suggest the value of additional research into the causes of interpretive divergence. The divergences revealed here likely have multiple sources, including differences in caseloads and docket compositions, judicial ideology, and decision-making structures. One particularly valuable effort would be to isolate the role of attorneys' briefing practices in shaping the interpretive styles of

237. For further development of these points, see Bruhl, *supra* note 27.

238. See generally William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (arguing that the Court should reconsider its strong presumption against overruling statutory precedent); Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (arguing for a heightened rule of statutory stare decisis).

239. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990). The approach is eclectic in the sense that interpretation draws on all available sources in an *ad hoc*, case-focused way rather than proceeding from a foundationalist theory. *Id.* at 321–22.

240. *Id.* at 353.

241. *Id.*

242. *Id.* at 352–53 & n.123.

243. ESKRIDGE ET AL., *supra* note 133, at 629–31; WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 141–42 (2016).

244. See generally Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165 (2016) (discussing the variety of purposes for which precedent is used).

various courts.²⁴⁵ In addition, it will be interesting to see whether the Supreme Court's interpretive practices change in the post-Scalia era and, if so, whether lower courts follow. The lower courts did not shift as far toward textualism as the Supreme Court, and so one would expect modulated responses to potential future changes too. Above all, future Supreme Court-focused research should hesitate before assuming that its results generalize to other federal courts, let alone to state courts and other interpreters of law.

B. Implications for Courts

A question I can only raise but not resolve here is what the Supreme Court and other federal courts should do about interpretive divergence. One possibility is for the Supreme Court to try to reduce divergence by unifying its own practices, clarifying that its methods are binding on lower courts, and policing lower courts' methodology. Another way to reduce divergence is for the Court to change its own practices so as to better match the practices of the far more numerous, and more constrained, lower courts. Those two alternatives could be characterized as leveling up and leveling down, respectively. A final alternative, of course, is to do nothing. That last option is appealing if one thinks that the interpretive system works decently enough despite divergence and that the potential for greater harmonization is limited.

For the lower courts, the fact of interpretive divergence does not necessarily mean that they should change their behavior to more closely mirror the Supreme Court's. Some differences across tiers of the judiciary result from the simple fact that the different courts are doing different things—that is, they are handling different types of cases. To the extent that they are also doing things differently even when handling similar cases, at least some of the difference stems from constraints of the institutional environment. Trying to mimic the Supreme Court's interpretive practices may be a poor use of the lower courts' limited resources.

C. Implications for Advocates and Their Teachers

"Know your audience" is good advice for attorneys, but at the same time this Article's results do not necessarily mean that attorneys should take their audience's interpretive practices as fixed. To be sure,

245. An example concerning the Supreme Court is Parrillo's work on the role of New Deal agency lawyers and Washington law firms in introducing the Court to legislative history. Parrillo, *supra* note 121.

some interpretive divergences reflect docket composition or hardwired constraints. But courts also respond to what they get. Various holistic-interpretation tools, for example, are highly top-heavy, but that may reflect the fact that attorneys are not making these arguments in district courts and busy judges do not unearth them on their own. If attorneys made more whole-code arguments to district courts, they would appear more often in the decisions.

The reality of interpretive divergence suggests that professors should reorient their Legislation and Statutory Interpretation courses in certain respects, such as by shifting the emphasis given to various interpretive tools. To be clear, the mere fact that a canon appears much more often in the Supreme Court than in the lower courts does not mean it should be deemphasized in teaching. After all, some differences between courts are the result of attorneys' litigation choices. For some tools, however, including many substantive canons, there are structural reasons for hierarchical differences in prevalence. The constitutional-avoidance and state-sovereignty canons have traditionally received heavy emphasis in Legislation courses,²⁴⁶ and they are indeed canons that students should know. But to prepare students for the interpretive practices of the lower courts, where most of the work is done, it is also important to study the presumption against preemption and the canon of construing federal jurisdiction narrowly, which is one of the most prevalent canons of all.²⁴⁷ In recognition of the diversity jurisdiction of the lower courts, not to mention the fact that state-court dockets dwarf federal-court dockets, students should also learn more about state interpretive approaches in the jurisdictions in which they are most likely to practice.²⁴⁸ Finally, although legislative history is less important than it used to be, it is still widely used throughout the federal judiciary. Law students should certainly be taught how to find legislative history and, more importantly, how to use it persuasively.

246. For example, they are 2 of the 3 top-billed substantive canons in Eskridge and his collaborators' *Legislation* casebook, along with the rule of lenity. ESKRIDGE ET AL., *supra* note 133, at xv.

247. A laudable development here is HILLEL Y. LEVIN, *STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE* xi (2d ed. 2016), which gives prominent treatment to preemption and the canon of narrow construction of statutes in derogation of the common law. Most observers regard the latter as archaic, but some state courts still use it.

248. Scholarly interest in state interpretive methods—for example, Gluck, *supra* note 1—is a terrific development, but that work focuses on states that have generated some theoretically interesting developments. Most states, like most of everything else, are probably theoretically boring.